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HALLECK'S
INTERNATIONAL LAW
VOL. I.

HALLECK'S
INTERNATIONAL LAW

OR

**RULES REGULATING THE INTERCOURSE OF
STATES IN PEACE AND WAR**

THIRD EDITION

THOROUGHLY REVISED AND IN MANY PARTS REWRITTEN

By SIR SHERSTON BAKER, BART.

**OF LINCOLN'S INN, AND OF THE WESTERN CIRCUIT, BARRISTER-AT-LAW;
AUTHOR OF 'THE LAWS RELATING TO QUARANTINE,' 'THE OFFICE OF THE VICE-ADMIRAL
OF THE COAST;' JOINT COMPILER OF THE 'DIGEST OF CASES' OF THE LAW
REPORTS, 1881-1885; RECORDER OF BARNSTAPLE AND BIDEFORD;
ASSOCIATE OF THE INSTITUT DE DROIT INTERNATIONAL**

VOL. I.

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PREFACE

TO

THE THIRD EDITION

THIS work was published in 1861 by the Author, Major-General Halleck of the United States Army. In 1878 I edited the work, leaving the original text untouched, but revising it to that date, by means of notes, adding also the principal cases which touched on International Law. In doing this I availed myself of the excellent Digest contained in the numbers of the 'Law Magazine,' edited by my friends the late Professor Taswell-Langmead and Mr. C. H. E. Carmichael of the Inner Temple. On that occasion, mindful of the hint conveyed by the late Sir Edward Creasy in his 'First Platform of International Law' (p. 81), I added an index, which was kindly prepared for me by my friend Mr. Jervis-Amos of Clement's Inn.

In this, the third edition, I have endeavoured to make the work more useful to the reader, by omitting all portions of the text which contained incorrect or obsolete law, and by inserting in the place thereof new matter concerning the existing law, instead of merely correcting the text by means of marginal notes. The reader will find some account of all the cases reported to the beginning of 1892 which are of interest to the international lawyer, and every question of historical or juridical importance to the same date will be found noted in its proper place. My endeavour has ever been to render the work not one of mere theory, but to make it

exceptionally one of practical utility, and one fit to be used by commanding officers on the exigency of the moment. I am happy to think that this endeavour has in the past recommended the work to the Lords Commissioners of the Admiralty of Great Britain, by whose orders it has been supplied to all officers in command of her Majesty's ships of war. I am glad to preface this edition by a biographical sketch of Major-General Halleck, written by Major-General Cullum of the United States Army and his intimate companion for many years. It is to the courtesy of the Honourable Judge Peabody that I owe the copy of this biography, which is now very difficult to obtain.

I take this opportunity of returning my thanks for the kindness of my friend Mr. Michael Placid Lynch of Lincoln's Inn, barrister-at-law, to whom I am indebted for assistance in seeing the proofs through the press.

S. B.

LIBRARY CHAMBERS, THE TEMPLE, E.C.
May 8, 1893.

PREFACE

TO

THE FIRST EDITION

DURING the war between the United States and Mexico the Author, while serving on the staff of the commander of the Pacific squadron, and as Secretary of State of California, was often required to give opinions on questions of international law growing out of the operations of the war. As it was sometimes difficult or impossible to procure books of reference, except in the libraries of ships of war which occasionally touched at the ports of the northern Pacific, he commenced a series of notes and extracts, which were arranged under different heads, convenient for use. The manuscript so formed has been occasionally added to as new books were procured, and it is now given to the press, with the hope that it may be found useful to officers of the army and navy, and possibly also to the professional lawyer. With this view, a number of authorities are referred to at the end of each paragraph. It is proper to remark that these authorities are not quoted in support of the views expressed in the text, for they are sometimes directly opposed to the opinions so expressed. They will, however, be found to contain something upon the questions discussed, or upon matters immediately connected with them.

H. W. H.

SAN FRANCISCO, CAL.
May 1861.

BIOGRAPHICAL SKETCH

OF

MAJOR-GEN. HENRY W. HALLECK

BY GEORGE W. CULLUM,
Brevet Major-Gen. United States Army

MAJOR-GENERAL HENRY WAGER HALLECK, who was born January 16, 1815, at Westernville, Oneida County, N.Y., died January 9, 1872, at Louisville, Kentucky, the head-quarters of the Military Division of the South, aged fifty-seven.¹

After receiving an ordinary common-school education at Hudson Academy, N.Y., and passing through a part of the course at Union College, he entered the United States Military Academy, July 1, 1835, from which he was graduated third in a class of thirty-one, and thence promoted to the army, July 1, 1839, as second lieutenant in the Corps of Engineers. His marked ability and skill as an instructor while a cadet caused his being retained as Assistant-Professor of Engineering at the Academy till June 28, 1840. He then, for a year, was assigned as an assistant to the board of engineers at Washington, D.C., where he prepared a work on 'Bitumen: its Varieties, Properties, and Uses,' which embraced all then known of the application of asphalt to military structures. From Washington he was transferred to assist in the construction of the fortifications of New York Harbour, where he remained till 1846, except while on the tour of examina-

¹ He was the son of Mr. Joseph Halleck of Westernville, his mother being a niece of the Rev. Daniel Wager of Ghent and related to the Wager family of Columbia. He married, in 1855, Elizabeth, daughter of Mr. John Hamilton of New York (grandson of General Philip Schwyler), by whom he left issue one son, Henry.—ED.

tion, in 1845, of public works in Europe. During his absence he was promoted (June 1, 1845) to a first lieutenancy. Upon his return to the United States the committee of the Lowell Institute, at Boston, Mass., attracted by Halleck's able report on 'Coast Defence,' published by Congress, invited him to deliver a course of twelve lectures on the science of war. These he published in 1846, in a volume with an introductory chapter on the 'Justifiableness of War,' under the title of 'Elements of Military Art and Science,' a second edition of which, with the addition of much valuable matter, including notes on the Mexican and Crimean wars, appeared in 1861. This popular compendium, then the best in our language, was much in quest by students of the military profession, and subsequently during the Rebellion became a manual for most officers of the army, and particularly for volunteers.

On the outbreak of the Mexican war Lieutenant Halleck was detailed as the engineer for military operations on the Pacific coast, and sailed with Captain Tompkin's artillery command in the transport 'Lexington,' which, after a seven months' voyage, reached her destination at Monterey, California. During this long and tedious passage round Cape Horn he undertook, partly as a military study and partly for the occupation of a mind not to be amused with trifles, a translation from the French of Baron Jomini's 'Vie Politique et Militaire de Napoléon,' which in 1864, with the aid of a friend, he revised and published in four octavo volumes with an atlas.

This celebrated Life of Napoleon, which had disclosed to the military world the secrets of the success of the great master of strategy in his wonderful campaigns, needs no new commendation, but, strange to say, it had never been translated into English, and in view of Halleck's graceful and perspicuous version none other will be required.

After partially fortifying Monterey as a port of refuge for our Pacific fleet and base for land incursions into California, Lieutenant Halleck took an active part, both civil and military, in all our affairs on this distant theatre of war. As Secretary of State under the military Governments of General Mason and Riley he displayed great energy, high administrative qualities, excellent judgment, and admirable adaptability to

his varied and onerous duties. As a military engineer he accompanied several expeditions, particularly that of Colonel Burton into Lower California, being engaged in the skirmishes of Palos Prietos, Urias, Todos Santos, and San Antonio, having in twenty-eight hours, with a few mounted volunteers, made a forced march of 120 miles to the latter place and surprised a considerable Mexican garrison, the governor barely escaping capture. Besides his engineer duties he performed those of aide de camp to Commodore Shubrick during naval and military operations on the Pacific coast, including the capture of Mazathan, of which for a time Halleck was lieutenant-governor, and was also chief of Colonel Burton's staff on his Lower California expedition. For these gallant and meritorious services he was breveted a captain, to date from May 1, 1847. After the termination of hostilities and the acquisition of California by the United States a substantial government became necessary. General Riley, in military command of the territory, called a Convention of delegates to meet at Monterey, September 1, 1849, to frame a State constitution. This Convention, after about six weeks' consideration, agreed upon a constitution, which was submitted to and adopted by the people; and by Act of Congress, September 9, 1850, California was admitted into the Union of American States. In all of these important transactions affecting the destiny of our new golden possessions, and which converted a turbulent community into a civilised and orderly commonwealth, Halleck was the great central figure on whose brow 'deliberation sat and public care.' He, as the real head of Riley's military government, initiated the movement of State organisation, pressed it forward with vigour, and was a member of the convention to form and of the committee to draft the adopted constitution, of which instrument he was substantially the author. So highly were his services appreciated, that he might have been elected one of the new United States senators, but he was unwilling then to relinquish his military profession. Continuing in the army, he remained as aide de camp on the staff of General Riley, from December 21, 1852, was inspector and engineer of lighthouses, and from April 11, 1853, a member of the board of engineers for fortifications on the Pacific coast, and was promoted captain of engineers July 1, 1853, all of which

positions he held till his retirement from the military service, August 1, 1854.

After leaving the army, where his pay was inadequate to his support and the future presented no distinguished career, Halleck devoted himself to the practice of the law in a firm of which for some time he had been a prominent member, and continued as director-general of the New Almaden quick-silver mine, a position he had held since 1850. Though among an irrepressible people, where it might be supposed his professional duties would have absorbed all his thoughts, Halleck's active brain found time for deep study and the preparation of valuable works, among which were 'A Collection of Mining Laws of Spain and Mexico,' 1859, a translation of 'De Fooz on the Law of Mines, with Introductory Remarks,' 1860, and his great treatise on 'International Law, or Rules Regulating the Intercourse of States in Peace and War,' 1861, which he subsequently condensed and modified to adapt it 'for the use of schools and colleges,' 1866. The latter work and its abridgment continued to hold the highest rank among publicists, have placed their author in the forefront with Vattel, Phillimore, Wheaton, &c., are quoted as authority by our own diplomats and statesmen, and are warmly commended abroad by such learned men as Dr. Heffter, Judge of the Supreme Court of Prussia and Professor of the Law of Nations in the University of Berlin. Halleck was also, in 1855, president of the Pacific and Atlantic Railroad from San Francisco to San José, California, and major-general of California militia, 1860-1. Union College, so early as 1843, recognised in Halleck a pupil worthy of the degree of A.M., and upon the matured scholar and soldier of 1862 conferred that of LL.D. In 1848 he was appointed Professor of Engineering in the Lawrence Scientific School of Harvard University, but declined the honour.

The outbreak of the Rebellion found Halleck at the head of the most prominent law firm¹ in San Francisco, and with large interests and much valuable property in California. Living in affluence, and at an age when men are usually excused from the performance of military duty, Halleck, notwithstanding, at once sacrificed self for country, and tendered his sword and talents in defence of the Union. General Scott,

¹ Messrs. Halleck, Billings, and Co.—ED.

well knowing his worth, immediately and strongly urged upon President Lincoln his being commissioned with the highest grade in the regular army. Accordingly he was appointed a Major-General, to date from August 19, 1861, accepting which he without delay repaired to Washington, was ordered to St. Louis, and on November 18, 1861, took command of the Department of Missouri, embracing the States of Missouri, Iowa, Minnesota, Wisconsin, Illinois, Arkansas, and Western Kentucky. Around him was a chaos of insubordination, inefficiency, and speculation, requiring the prompt, energetic, and ceaseless exercise of his iron will, military knowledge, and administrative powers. The scattered forces of his command were a medley of almost every nationality, with the organisation of each and the excellence of none ; Missouri and Kentucky were practically but a border screen to cover the operations of the seceding South ; and even his head-quarters, St. Louis, fortified at exorbitant cost and in violation of all true engineering principles, neither protected the city from insurrection within nor from the besiegers without. Hardly had Halleck assumed command before his remorseless Juggernaut of reform began to crush out every abuse and scatter all opposing obstacles. Fraudulent contracts were annulled ; useless stipendiaries were dismissed ; a colossal staff hierarchy, with more titles than brains, was disbanded ; composite organisations were pruned to simpler uniformity ; the construction of fantastic fortifications was suspended ; and in a few weeks order reigned in Missouri. With like vigour he dealt blow after blow upon all who, under the mask of citizens, abetted treason—informants communicating with the enemy were treated as spies ; bridge-burners and marauders were tried and sentenced to death by military commissions ; towns and counties were compelled to pay all damages to public property destroyed within their limits ; carriages flaunting rebel flags were seized in the streets and promptly confiscated ; women insulting our soldiers, or signalling the inmates of military prisons, were confined to their homes ; wealthy Secessionists were assessed for the support of loyal refugees, and failing to pay were sent beyond our lines ; and to make assurance doubly sure all officials of corporations, licensed lawyers, voters at elections, employés of the Government, and even the faculty of the University of Missouri were required to take the oath of

allegiance to the United States. But while from head-quarters thus energetically dealing with the traitors at home, he did not neglect the traitors in arms, over whom by his admirable strategic combinations he quickly secured success after success, till, in less than six weeks after assuming command, a clean sweep had been made of the entire country between the Missouri and Osage Rivers, and General Price, cut off from all supplies and recruits from northern Missouri, to which he had been moving, was in full retreat for Arkansas.

Though the winter had set in Halleck relaxed not a moment to ensure new victories. The Union supremacy in Missouri being established, he now turned his attention to the opening of the Mississippi River, which General Scott had intended unbarring by a flotilla and an army descending it in force. Halleck, however, was satisfied that this plan would only scotch the serpent of Secession, and the monster be again able to return upon its path. To effectually kill it and turn all the river strongholds he felt that the Confederacy must be rent in twain by an armed wedge driven in between this great stream and the mountains on the east. On January 27, 1862, the President had ordered a general advance of all the land and naval forces of the United States to be simultaneously made against the insurgents in arms on the 22nd of the coming month. In anticipation of his part of the grand movement, early in February Halleck sent his Chief of Staff to Cairo, to direct in his name, when necessary, all operations auxiliary to the armies about to take the field on the Mississippi, Tennessee, and Cumberland Rivers, which their respective commanders soon put in motion. Up to this time all the effort of our arms had been tentative, producing but local results. The Cabinet at Washington had yet to learn, what military minds knew so well, that a great victory won at a decisive point solves many vexed political problems. Not till long after was the demonstration of this established truth made evident by Charleston and Richmond, impenetrable to the most powerful front attacks, finally falling before simple strategic flank marches. 'One evening late in December 1861,' says Dr. Draper in his great 'History of the American Civil War,' 'Generals Halleck, Sherman, and Cullum were conversing together at the Planters' Hotel in St. Louis on the proper line of invasion. They saw clearly that the Con-

federates meant to stand on the defensive. . . . A map lay on the table, and with a blue pencil Halleck drew a line from Bowling Green to Columbus, past Forts Donelson and Henry, and another perpendicular to its centre, which happened to coincide nearly with the Tennessee River. "There," said he, "that is the true line of attack." This rebel first line of defence lay screened behind Kentucky's 'quasi' neutrality, with its flanks strongly protected by the fortifications of Columbus and Bowling Green, but its centre was but feebly secured by Forts Henry and Donelson. The second line of defence followed the railroad from Memphis, on the Mississippi, to Chattanooga, a most important position in the mountains, threatening both South Carolina and Virginia by its railroad connections with Charleston and Richmond. Still a third line, with almost continuous communication by rail, extended from Vicksburg through Meridian, Selma, and Montgomery to Atlanta, with railroad branches reaching to the principal ports on the Gulf and South Atlantic.

Operating by the Ohio River as the base, and the navigable Tennessee and Cumberland as perpendicular lines of operation, it is needless to repeat history by stating the success of Halleck's masterly strategy, carried out by his able lieutenants against the rebel first line of defence. In a little over three months of his sway in the west, Forts Henry and Donelson had fallen, the strategically turned flanks of the enemy's line, protected by the powerful works of Bowling Green and Columbus, were deserted, and Nashville, the objective of the campaign, was in our possession. In the meantime Curtis had been sent to drive the rebels out of Missouri, and early in March gained the decisive battle of Pea Ridge, in Arkansas, the enemy flying before him to the protection of the White River ; and Poper, despatched to New Madrid, after taking that place, confronted the fugitives from Columbus at Island No. 10, which, by the happy device of Hamilton's cut-off canal, was turned and taken in reverse, and this strong barrier of the Mississippi removed by the joint action of the army and Navy. By these masterly operations the Confederate first line, from Kansas to the Alleghany Mountains, being swept away, and the enemy's strongholds captured or evacuated, our forces moved triumphantly southward, pressing back the insurgents to their second line of defence, extending from

Memphis to Chattanooga. On March 11, 1862, to give greater unity to military operations in the west, the Departments of Kansas and Ohio were merged into Halleck's command, the whole constituting the Department of the Mississippi, which included the vast territory between the Alleghany and Rocky Mountains. Buell, marching by railroad from Nashville, was directed, on the withdrawal of the enemy from Murfreesborough, to unite with Grant, proceeding to Pittsburg Landing by the Tennessee. Their fortunate union secured the great victory of Shiloh. Then, to more immediately direct military operations, Halleck took the field, and, after reorganising and recruiting his forces, moved on Corinth, where the enemy was strongly entrenched on the important strategic position at the junction where the railroads connecting the Gulf of Mexico and the Mississippi River with the Atlantic Ocean came together. By striking a vigorous blow here on the enemy's left centre Halleck proposed to repeat the strategy which had so admirably accomplished its purpose against the Confederate first line; but success was indispensable, hence he made every step of his progress so secure that no disaster should be incurred, involving the loss of what he had already gained with so much effort and bloodshed. So admirably were his successive camps guarded against surprise or sudden dash that Beauregard dared not attack, though on May 2 he made his arrangements and issued his proclamation to the 'soldiers of Shiloh and Elkhorn' that he was about to give battle. A month after the initiation of Halleck's march, May 27, his compact columns were close upon Corinth's fifteen miles of heavy entrenchments, strengthened by powerful batteries or redoubts at every road or assailable point, and the whole covered to the boggy stream in front by a dense abattis, through which no artillery or cavalry, nor even infantry skirmishers, could have passed under fire. On the next day heavy siege guns were put in position, and everything made ready for a desperate attack upon the enemy, who had been hotly contesting our advance, doubtless to give themselves time to secure their retreat and the destruction of their supplies. On the 29th operations were earnestly resumed against the enemy, who, though driven back at all points, preserved an unbroken front, and served his batteries with great energy. On the morning of the 30th the enemy's

slackened fire proved what, from the noise of explosions and moving trains during the preceding night, had been feared—that Beauregard, despairing of maintaining himself in this immense stronghold of the Confederacy, constructed with so much labour and care, had fled. Upon the occupation of Corinth its enclosing and commanding fortifications were found to be impregnable to assault. Within desolation and smouldering ruins were everywhere visible, and the evacuation, commenced some days before by the removal of the sick, was fully completed. Immediately Pope was sent in hot pursuit of the retreating enemy; soon after Buell was despatched towards Chattanooga, to destroy the railroad connections. Sherman was put in march for Memphis, but the navy had captured the place when he had reached Grand Junction. Without delay batteries were constructed on the southern approaches of the place, to guard against any sudden return of the enemy; and with prodigious energy the destroyed railroad to Columbus was rebuilt, to maintain our communications with the Mississippi and Ohio, in jeopardy by the sudden fall of the Tennessee, by which supplies had been received. It had now been a little over six months since Halleck assumed command at St. Louis, and from within the limits of his department, during this period, the enemy had been driven from Missouri, the northern half of Arkansas, Kentucky, and most of Tennessee, and strong lodgments made in Mississippi and Alabama. Well deserved, therefore, was the high compliment, previously paid by Mr. Stanton, always chary of praise, that Halleck's 'energy and ability received the strongest commendations of the War Department,' and added, 'You have my perfect confidence, and you may rely upon my utmost support in your undertakings.' Such, in fact, was the very high appreciation entertained of Halleck's merits by both the Secretary of War and the President that during the General's occupation of Corinth, while organising for new victories against the enemy's third line of defence, two assistant-secretaries of war and a senator were sent there to urge upon Halleck the acceptance of the position of General-in-Chief; but he decidedly declined the high honour, and did not go to Washington till positive orders compelled him.

Halleck has been severely criticised for consuming six weeks in reaching Corinth. It must be remembered that our

losses at Shiloh were very heavy, and the consequent demoralisation such that no vigorous pursuit of the retreating enemy had been made. When Halleck arrived at Pittsburg Landing our armies had to be rehabilitated, reinforcements brought from a distance, and arms and supplies received. With the utmost exertions of the General and his staff these necessary preparations consumed over two weeks. When the forward movement began it was over a very uneven country, serrated into broken ridges and marshy valleys; through continuous and dense forests filled with tangled undergrowth; across swollen streams whose burnt bridges had to be rebuilt; over broken-up roads, often in deep morasses, and obstructed by felled timber; through a district where all supplies had to be transported, frequently on pack mules; in a State whose every inhabitant was hostile and a spy for the enemy; in a region where no reconnaissance could be made except by force of arms; and, to crown all difficulties, deluging rains flooded the country, rendering communication almost impracticable. Perhaps more rapid marches may have been possible, but with forces exhausted, disheartened, and half prepared for battle, a like disaster to that incurred by the enemy at Shiloh might have been our fate, with the possible loss of all that we had acquired, to say nothing of national dishonour. Besides, Halleck had the most positive orders of the War Department to move cautiously and risk nothing. With such a weight of responsibility resting upon the commanding general the inconsiderate criticisms on Halleck—particularly of those who have never made war—are hardly just. However, whether so or not, they must in some measure be shared by his distinguished lieutenants, subsequently our trusted leaders, for scarce was an important movement of the campaign made without their concurrence. Then all had confidence in Halleck, and it was sufficient that ‘Old Brains’—his *sobriquet* with the army—had decided upon any operation which, after the danger had passed, has too often since been flippantly condemned. Reluctantly leaving Corinth, to which he hoped to return again, to enter upon the great work of opening the Mississippi and crushing the Confederacy in the south-west, Halleck reached Washington (July 23, 1862), and at once assumed command as General-in-Chief of all the armies of the United States. The first problem presented was how safely to

unite the two eastern armies in the field, so as to cover the capital and make common head against the enemy, then interposed between them and ready to be thrown at will on either. Honest differences of opinion of able generals existed as to the best measures to be adopted to accomplish the desired end, which it is unnecessary here to re-discuss, and the brief limits of this sketch will not permit our following in detail the after reverses and glories of the magnificent Army of the Potomac, nor the brilliant triumphs of the transcendent leaders whom Halleck had left in the west. Suffice it to say that the General-in-Chief entered upon the duties of his high office with heart and soul devoted to the preservation of the Union, and gave the utmost of his eminent abilities, indomitable energy, and unremitting industry to his country's cause. Often compelled to assume responsibilities which belonged to others, constantly having to thwart the purposes of selfish schemers, and always constrained to be reticent upon public affairs which many desired to have divulged, Halleck, like all men in high stations in times of trial, soon became a target for the shafts of the envious, the disloyal, and the disappointed. Doubtless, with scant time for the most mature reflection, he made errors; but Turenne, the great marshal of an age of warriors, says, 'Show me the commander who has never made mistakes, and you will show me one who has never made war.' The time may yet come when the seal of secrecy will be removed, and Halleck's correspondence during the Rebellion will be given to the world. Then justice will be done; then will be understood why the lion-hearted Lincoln, the stern Stanton, and those responsible for the conduct of the war reposed unbounded confidence in him, and then will be revealed the pure patriot, the skilful strategist, the learned lawyer, the sterling statesman, and the valiant vindicator of the nation's honour.

Congress, in recognition of Grant's glorious campaigns of Vicksburg and Chattanooga, revived the grade of lieutenant-general. Though a desire was manifested in high places in some way to retain Halleck in the performance of his high functions, he at once insisted that compliance should be made with the obvious intentions of the law, and that being senior in rank Grant necessarily must be the General-in-Chief. However Halleck remained at Washington from March 12, 1864, to

April 19, 1865, as Chief of Staff of the Army, under the orders of the Secretary of War and General-in-Chief, performing much of the same duties as before had devolved on him at head-quarters. Halleck from April 22 to July 1, 1865, was in command of the Military Division of the James, with head-quarters at Richmond. It was while here that he issued an order to certain officers 'to pay no regard to any truce or orders of General Sherman respecting hostilities, on the ground that Sherman's agreement could bind his own command only, and no other,' and 'to push onward regardless of orders from anyone except General Grant, and cut off Johnson's retreat.' The responsibility for this order Halleck, in a well-written letter, asserted was not his, but his superiors', and that he had not trespassed upon Sherman's departmental command. However it produced a great coolness between these distinguished men ; but long since the breach was healed and mutual confidence restored between these old friends. Upon the termination of hostilities and the disbandment of the volunteer forces, Halleck was ordered to the Military Division of the Pacific, of which he took command on August 30, 1865, and on March 16, 1869, was transferred to that of the South, which he retained to his death. It is unnecessary to say that both at San Francisco and Louisville he ably, energetically, and economically carried out the requirements of the Government. The satisfaction he gave in his late command cannot be better expressed than in the words of an intelligent observer residing in Louisville, who says in a private note, 'Of all the men who have been in command here General Halleck was the best liked. He was not only a good soldier, but a statesman and a gentleman, and I am thoroughly convinced that, if there had been a Halleck in command of every department in the south and south-west, we should long since have ceased to hear of outrages consequent upon the "late unpleasantness."'

Halleck, with few advantages in early life, and hardly the rudiments of a classical education, overcame all obstacles in his path by his power of mind and character. He took at once an honour place at West Point, was a conspicuous officer of engineers, became a youthful statesman in the creation of a State, rose to the direction of various public trusts, established an envied reputation for high authorship, was a

prominent publicist among learned jurists, and held supreme command of vast armies in a great struggle for a nation's existence. It is unnecessary to describe each of these segments of his fame, or in language build monuments to his mental vigour and distinguished deeds, achieved, without extraordinary leaps, in a long and steady race of usefulness. Like the eagle's strength, his is to be measured not only by his height of place, but his continuance on the wing. Halleck had a strong, clear intellect, which enabled him to take a comprehensive grasp of the various important matters presented to his consideration, and was sustained in his conclusions by a most assiduous industry and self-reliant perseverance. Indeed, determination was his most marked characteristic, evinced in a calm firmness which neither entreaty nor persuasion could move from its fixed purpose. Of such a nature caution would be a prevailing quality. With these was united a modesty almost to shyness, and thus perhaps he did himself injustice, as his sensitiveness to the value of sincerity caused him often to repel rather than be deemed insincere. This known temperament secured him the most valuable estimation of his instructed and ablest fellow officers. His dryness of manner was no argument of want of heart, for indeed he was a warm, true, loyal friend, and in the inner circle of his life was tender and playful, showing a keen sense of humour. His home was a scene of perfect happiness and kind hospitality. Of children he was fond, had an ardent love of Nature, and indulged the expectation of closing his latter hours in a retreat in the beautiful region south of San Francisco, looking on the Pacific Ocean. Though far thence life's silver cord was loosed, its crowning act was his open acknowledgment of the source of all his strength, and his last hours closed with sweet remembrances of cherished friends, among whom the writer of this is happy to be numbered, for he well knew his departed comrade's great worth and truly loved him.

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THE FIRST VOLUME

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Jur. N. S.	The Jurist, New Series
Knapp	Knapp's Privy Council Reports
L. and C.	Leigh and Cave's Crown Cases
L. J.	Law Journal (Reports in all the Courts)
L. R.	Law Reports (in all the Courts)
Ld. Raym.	Lord Raymond's Reports, K.B.
Lev.	Levinz Reports, K.B.
M. and Sel.	Maule and Selwyn's Reports, K.B.
M. and W.	Meeson and Welsby's Reports, Exch.
Macq.	Macqueen's House of Lords Cases
Meriv.	Merivale's Reports, Chancery
Mod.	Modern Reports, K.B.
Mood.	Moody's Crown Cases
Noy	Noy's Reports, K.B.
P. W. R.	Peere William's Reports, Chancery
Price	Price's Reports
R. and R.	Russell and Ryan's Crown Cases
Rob.	Christopher Robinson's Admiralty Reports
Rob. (W.)	William Robinson's Admiralty Reports
Roll.	Rolle's Abridgment
Rose	Rose's Reports, Bankruptcy
Russ. and Myl.	Russell and Mylne's Reports

Salk.	Salkeld's Reports, K.B.
Scott	Scott's Reports
Show. Parl. Cas.	Shower's Parliament Cases
Sid.	Siderfin's Reports, K.B.
Sim.	Simon's Reports
Sm. L. Cas.	Smith's Leading Cases
Stark.	Starkie's Reports, N.P.
Stew. Vice-Ad.	Stewart's Vice-Admiralty Reports
Sw. and Tr.	Swabey and Tristram's Reports
T. R.	Term Reports (Durnford and East)
Taunt.	Taunton's Reports, C.P.
Tur. and Russ.	Turner and Russell's Reports
Ves.	Vesey Senr.'s Reports
Ves. and B.	Vesey and Beames's Reports
Ves. Jun.	Vesey Junr.'s Reports
Vern.	Vernon's Reports
Vin. Abr.	Viner's Abridgment
W. R.	Weekly Reporter
Will.	Willis's Reports, K.B. and C.P.
Wils.	Wilson's Reports

AMERICAN

Am. Law R.	American Law Reporter
Am. R.	American Reports, Select Cases
Bald. R.	Baldwin's Reports, U.S. (Third Circuit)
Bees R.	Bees's Admiralty Reports, U.S. (District of South Carolina)
Binney.	Binney's Reports, Pennsylvania
Black	Black's Reports, U.S., Supreme Court
Blatchf.	Blatchford's Reports, U.S., 2nd Circuit
Blatchf. Pr. Cas.	Blatchford's Prize Cases, U.S., District of New York
Bond	Bond's Reports, U.S., District of Ohio
Brock	Brockenborough's Reports of Marshall's Decisions
Caines Cas.	Caines Cases, New York
Cala. R.	California Reports
Chand. Law R.	Chandler's Law Reports
Cl. and H.	Clarke and Hall's Congressional Election Cases
Conn.	Connecticut Reports

Cowen	Cowen's Reports, New York
Cranch	Cranch's Reports, U.S., Supreme Court
Curtis	Curtis's Reports, U.S., 1st Circuit
Ct. of Cl. . . .	Court of Claims Reports (Nott and Huntington)
Dallas	Dallas's Reports, U.S., Supreme Court and Pennsylvania
Dana	Dana's Reports, Kentucky
Gall. or Gallis. . . .	Gallison's Reports, U.S., 1st Circuit
Gill and Johns. . . .	Gill and Johnson Reports, Maryland
Gray	Gray's Reports, Massachusetts
Green. . . .	Greene's Reports, Iowa
H. L. C. . . .	Holcombe's Leading Cases, Commercial Law
H. Rep. Ex. Doc. . . .	House of Representatives, Executive Documents
Hall's Am. Law Jour. . . .	Hall's American Law Journal
Harr. and John. . . .	Harris and Johnson's Reports, Maryland
Haw. . . .	Hawks's Reports, North Carolina
Howard	Howard's Reports, U.S., Supreme Court
Int. Rev. Rec. . . .	Internal Revenue Record, New York
John. . . .	Johnson's Reports, New York
Low. . . .	Lowell's Decisions, U.S., District of Massachusetts
Marsh. . . .	Marshall's Decisions
Mart. N.S. . . .	Martin's Reports, North Carolina
Martin	Martin's Reports, Louisiana
Mason	Mason's Reports, U.S., 1st Circuit
Mass. . . .	Massachusetts Reports
McLean	McLean's Reports, U.S., 7th Circuit
Met. . . .	Metcalf's Reports, Massachusetts
Miss. . . .	Mississippi Reports
Munf. . . .	Munford's Reports, Virginia
N. Y. R. . . .	New York Court of Appeals Reports
New York Legal Obs. . . .	New York Legal Observer
Newb. . . .	Newberry's Admiralty Reports, U.S., various districts
Nott and H. . . .	Nott and Huntington's Reports, U.S., Court of Claims
Paige	Paige's Chancery Reports, New York
Paine	Paine's Reports, U.S., 2nd Circuit
Peters	Peters's Reports, U.S., Supreme Court
Peters Adm. . . .	Peters's Admiralty Decisions, U.S., District of Pa.

Peters Circ. C.	.	.	Peters's Reports, U.S., 3rd Circuit
Phil.	.	.	Philadelphia Reports, Common Pleas
Pick.	.	.	Pickering's Reports, Massachusetts
Pittsb.	.	.	Pittsburg Legal Journal Reports
Rev. Cas.	.	.	Revenue Cases
Sandf.	.	.	Sandford's Reports, Superior Court, New York
Sprague	.	.	Sprague's Admiralty Decisions, U.S., District of Massachusetts
Stew.	.	.	Stewart's Reports, Alabama
Sumn.	.	.	Sumner's Reports, U.S., 1st Circuit
Texas	.	.	Texas Reports
Up. Can. R..	.	.	Upper Canadian Reports
Wall.	.	.	Wallace's Reports, U.S., Supreme Court
Wash. C. C..	.	.	Washington Reports, U.S., 3rd Circuit
Wash. Va.	.	.	Washington Reports, Virginia
Wend.	.	.	Wendell's Reports, New York
Wheaton	.	.	Wheaton's Reports, U.S., Supreme Court
Wheaton Dig.	.	.	Wheaton's Digest of the Decisions of the United States Supreme Court

Corrigendum

Pp. 218 and 358 of vol. i., foot notes concerning the 'Marriage Acts' 1890 and 1891. These Acts were repealed, whilst the volume was passing through the press, by the 'Foreign Marriage Act' 1892, for which see vol. ii. p. 569.

INTERNATIONAL LAW

CHAPTER I

HISTORY OF INTERNATIONAL LAW

1. Division of the subject—2. International law among the Jews—3. Among the ancient Greeks and Romans—4. The *jus gentium* of the Romans—5. Introduction of Christianity into the Roman Empire—6. International law during the Dark Ages—7. Its origin in modern Europe—8. Effects of Papal supremacy—9. Effects of the Reformation—10. Other causes of its advancement in the Middle Ages—11. The Church in temporal matters—12. The Rhodian laws, Rooles d'Oléron, &c.—13. The Consolato del Mare, Guidon de la Mer, &c.—14. Writers on international law prior to Grotius—15. Writings of Grotius—16. Political events from the Peace of Westphalia to that of Utrecht—17. Questions of international law agitated during that period—18. Writers on public law immediately following Grotius—19. Political events from the Peace of Utrecht to the end of the Seven Years' War—20. Questions of public law during that period—21. Writings of publicists—22. From the close of the Seven Years' War to the French Revolution—23. Questions of public law during that period—24. Writers on international law—25. From the beginning of the French Revolution to the Congress of Vienna—26. Questions of international law during that period—27. Writers on international law—28. Decisions of judicial tribunals—29. From the Congress of Vienna to the Treaty of Washington—30. Questions of international law during that period—31. Writers on international law—32. From the Treaty of Washington to the beginning of the Civil War in the United States—33. Questions agitated in America during this period—34. Questions agitated in Europe—35. Text-writers and judicial opinions—36. Diplomatic and legislative discussions—37. From the beginning of the Civil War in the United States to the end of 1891—38. Important legislative and diplomatic questions—39. Writers on international law.

§ 1. IN the following sketch of the history of International Law we shall divide the subject into periods of unequal length, but usually marked by some important event, and having reference rather to the progress of the law than the history of nations. This plan seems preferable to that adopted by Hallam, of dividing it arbitrarily into periods

Division
of the
subject

of half a century each. We shall, therefore, consider the condition of international jurisprudence: 1st, Among the ancients; 2nd, From the beginning of the Christian era to the fall of the Roman Empire; 3rd, From the fall of the Roman Empire to the beginning of the Reformation; 4th, From the beginning of the Reformation to the Peace of Westphalia; 5th, From the Peace of Westphalia to the Peace of Utrecht; 6th, From the Peace of Utrecht to the close of the Seven Years' War; 7th, From the close of the Seven Years' War to the beginning of the French Revolution; 8th, From the beginning of the French Revolution to the Congresses of Paris and Vienna in 1814 and 1815; 9th, From the Congress of Vienna to the Treaty of Washington in 1842; 10th, From the treaty of Washington to the Civil War in the United States in 1861; 11th, From the Civil War in the United States to the end of 1891.

These divisions are somewhat different from those adopted by other writers, but they seem to us most rational, or, at least, as best suited to the very brief historical outline which we propose.

First Period—International Law among the Ancients.

Inter-
national
law
among the
Jews

§ 2. The history of the Jews, as derived from the Old Testament and the writings of Josephus, furnishes much information relating to the rules by which the ancient Hebrews regulated their intercourse with other nations in peace and war. Grotius and other writers on international jurisprudence have illustrated their own views of public law by numerous examples taken from the history of this singular people, and Selden's Law of the Jews, entitled, *De Jure Naturali et Gentium juxta disciplinam Ebræorum*, is a work of great erudition. He very justly distinguishes between the usages and practices which were susceptible of general application, and those limited rules of conduct which constitute the *jus gentium* of the Roman lawyers—that is to say, he divides human right into two parts—civil right, the less extensive, and the right of nations, more extensive than the civil right. He considers that civil right is various, including in it the commands of a father to his child, and of a master to his servant; but that the right of nations (*jus gentium*) derives its authority from the will of all, or, at least, of many nations.

'I say of many,' he continues, 'because there is scarce any right found except that of nature, which is also called the right of nations, common to all nations. Nay, that which is reputed the right or law of nations in one part of the world is not so in another.' As might be expected from an isolated and religious people, most of the laws regulating their international intercourse in peace and war were of the character of the positive right of nations (*jus gentium*); but this is not to be confounded with international law proper (*jus inter gentes*). Nevertheless, the history of the ancient Jews is well worthy of careful study, in its connection with this branch of public law (*jus gentium*); it must be remembered there is much in the Jewish dispensation, although of Divine revelation, which has exclusive reference to them as a peculiar people, with a special mission to perform, and therefore not of general application.

§ 3. Nearly all our knowledge of international law among ancient States is derived from their intercourse with the Jews, and with the Greeks and Romans, more particularly with the latter. Although no professed treatise on international jurisprudence has been left us by any classical writer, nevertheless much information respecting this branch of public law among the Greeks and Romans has been elicited from their civil laws and military ordinances, and from the history of their numerous wars. Most of these rules were exclusively founded on religion. 'The laws of peace and war, the inviolability of heralds and ambassadors, the right of asylum, and the obligation of treaties, were all consecrated by religious principles and rites. Ambassadors, heralds, and fugitives, who took refuge in the temples, or on the household hearth, were deemed inviolable, *because* they were invested with a sacred character and the symbols of religion. Treaties were sanctioned with solemn oaths, the violation of which, it was believed, must be followed by the vengeance of the gods. War between nations of the same race and religion was declared with sacred rites and ceremonies. The heralds proclaimed its existence by devoting the enemy to the infernal deities.'

§ 4. What was called the law of nations (*jus gentium*) by the Romans, was not any positive system or code of juris-

Among
the
ancient
Greeks
and
Romans

The *jus*
gentium
of the
Romans

¹ Lawrence's *Wheaton*, pref. to 3rd edit.

prudence established by the consent of all, or even the 'greater part, of the nations of the world ; it was simply a civil law of their own for the purposes of war. They early incorporated into their maritime laws the principles of the nautical code of the Greeks, and as their commerce and intercourse with other nations increased, these laws became more liberal and general in their character and provisions. Many fragments of these old laws are still preserved and may be traced in the Code Theodosian, the Code, Digest, and Pandects of Justinian, in the Basilicæ, and the Maritime Constitutions promulgated by the Emperor Leon.¹

Second Period—From the Christian Era to the Fall of the Roman Empire.

Introduc-
tion of
Christ-
ianity

§ 5. The doctrines of the Christian religion, and the universality of their application, were well calculated to give a milder character and a greater extension to the principles of law, than they had received either under the Jewish dispensation or the defective and multifarious system of the Greek and Roman mythology. But its progress was comparatively slow, and the bitter persecutions suffered by the early Christians naturally engendered a spirit of retaliation. Moreover, the contests carried on by Constantine and the succeeding Christian Emperors with barbarous States were not of a character to develop the refinements of a *commercium belli*, or even to cause the observance of the acknowledged usages of war, or the previously established practices of intercourse in peace. The seeds of intellectual disease had already been sown, and all branches of learning were on the decline before the acknowledgment and toleration of Christianity in the Empire, by the formal edict of pacification at the hands of Constantine. 'The revolution accomplished by Constantine,' says Schlegel, 'might have become a real, and by far the most comprehensive, regeneration of the Roman State, as it substituted for its originally defective and now completely rotten foundation of paganism, a new principle of life, and a higher and more potent energy

¹ Wheaton, *Hist. Law of Nations*; Ward, *Law of Nations*, vol. i. pp. 171 et seq.; Manning, *Law of Nations*; Boulay-Paty, *Droit. Com. Mar.*, t. i. pp. 33-54; Pardessus, *Us et Coutumes de la Mer*, tom. i. caps. 1-5; Laurent, *Droit des Gens*; Ritter, *De Fecial. Pop. Rom.*

of divine truth and eternal justice. But Christianity had not yet become the universal religion of the people, and the Empire of Rome—otherwise the great reaction, which took place under Julian—had not been possible. The peasantry, in particular, continued for a long time yet attached to the old idolatry ; and hence the name of pagans was derived. Even Constantine, though he publicly declared himself a convert to Christianity, still did not dare to receive baptism immediately, and thus enter fully into the great community of Christians. The administration of the Roman State was so completely interwoven with pagan rites and pagan doctrines, that, from an act of this public nature, dangerous collisions might have at first easily ensued. On the whole, the old Roman maxims and principles of State policy continued to prevail, even for a long time after the reign of Constantine ; and the period had not yet arrived when Christianity was to work a fundamental reform throughout the whole political world—and a Christian government, if I may so speak, was to be established and organised on that eternal basis, and to strike a deep root and grow into the faith and life of the people, and into their habits and their feelings ; but this great renovation was reserved for another and a later period.’¹

Third Period—From the Fall of the Roman Empire to the Beginning of the Reformation.

§ 6. After the fall of the Roman Empire, many cities still preserved their municipal constitutions, and the *jus gentium*, in connection with the *jus civile*, into which many of its principles had become incorporated, continued to be practised to a limited extent, both in Italy and the provinces. Some have attempted to trace its influence upon the institutions and history of the different European nations, even through the darkest ages of human learning ; it must, however, be admitted that this influence was not very marked in any case, and was by no means general.² But on the restoration of the Western Empire under Charlemagne, the study of the Roman civil law was revived, and its professors were fre-

Inter-
national
law
during the
Dark Ages

¹ Schlegel's *Philosophy of History*, lect. 10.

² Hallam, *Literature of Europe*, vol. i. pp. 1–2 ; Gibbon, *Decline and Fall of the Roman Empire* ; Gardin, *De la Diplomatie*, pt. 1.

quently employed in diplomatic missions, and as arbiters in disputes which arose between different cities and States.

Its origin
in modern
Europe

§ 7. The origin of the law of nations in modern Europe has been traced to two principal sources—the Canon law and the Roman civil law. It was founded, says Wheaton, mainly upon the following circumstances: ‘First, The union of the Latin Church under one spiritual head, whose authority was often invoked as the supreme arbiter between sovereigns and between nations.’ Under the auspices of Pope Gregory IX., the Canon law was reduced into a code, which served as the rule to guide the decisions of the Church in public as well as private controversies. Second, The revival of the study of the Roman law, and the adoption of this system of jurisprudence by nearly all the nations of Christendom, either as the basis of their municipal code, or as subsidiary to the local legislation of each country.’¹

Effects of
Papal
suprem-
acy

§ 8. On the formation and consolidation of the Christian government in modern times by Charlemagne, the human mind began to recover from its torpor, and art, science, and learning sprang up out of the ruins of the ancient world. The Church had constituted a kind of bridge, spanning the chaotic gulf which separated declining antiquity from modern civilisation. The effect which this change produced upon international relations, and public law in general, may be traced in the lives of such rulers as Charlemagne, the pious King Alfred, King Stephen of Hungary, Rodolph of Hapsburg, and St. Louis of France.²

The power which the Bishop of Rome obtained, by his spiritual influence, first over the minds, and afterwards over the temporalities of Christian princes, did much for the civilisation of Europe by the restoration and preservation of peace, and by restraining the ambitious and crafty from despoiling their neighbours. Thus the Third Lateran Council under Pope Alexander III. (in 1179) endeavoured to stay the frequent private feuds of that period by confirming the provisions of the *Treuga Dei*, or Truce of God. In the beginning of the twelfth century Gerohus wrote a treatise, suggesting

¹ Lawrence's *Wheaton*, pref. to 3rd edit.

² Laurent, *Droit des Gens*, tom. v. ; Ward, *Law of Nations*, vol. ii. pp. 6-11 ; Schlegel, *Philosophy of History*, lect. 15 ; Manning, *Law of Nations*, pp. 10, 11 ; Garden, *De la Diplomatie*, pt. 1 ; Mackintosh, *Miscell. Works*, p. 165 ; Wheaton, *Elem. Internat. Law*, pref. to 3rd edit.

a theory of perpetual pacification,¹ by which (*inter alia*) all disputes among Christian princes were to be referred to the arbitration of the Pope, and any prince refusing to obey the decision was to be subject to excommunication, and to have war waged against him by all the other princes of Christendom.² But such appeals to the Popes in matters temporal have by some been considered to be destructive to the very foundations of International Jurisprudence, and to be dangerous to the individuality of States, in reducing them to a dependence upon the Papal will.

Fourth Period—From the Beginning of the Reformation to the Peace of Westphalia.

§ 9. The Reformation began to produce its effects upon the minds of men some time prior to the advent of Luther. Its effects were by no means confined to articles of religious faith. A greater theological liberty was its immediate object, but this was intimately allied with political freedom; and these two necessarily caused a great change in the law of nations. The different States of Europe were ranged under different standards, and each party was united by a kind of *common cause*. Moreover, the separate members of each of the contending masses were bound together by principle or interest, rather than by any recognised paramount authority, for even the Catholic States soon ceased to render obedience to Papal supremacy in matters purely temporal. This necessarily led to the independence of sovereign States, the true basis of international jurisprudence. The impulse which had been given to this subject by the Canon law was gradually dying away, and the infant science was likely to be smothered and lost, when the more advanced notions engendered by the spirit of progress rescued it from destruction and placed it upon a more sure and firm foundation. Its progress was thenceforth both certain and rapid.

Effects of
the Re-
formation

§ 10. Mr. Ward, in his 'Enquiry into the Foundation and History of the Law of Nations in Europe from the Time of the Greeks and Romans to the Age of Grotius,' has pointed out and discussed the influence of Christianity and of the

Other
causes
of its
advance-
ment

¹ Labbe, *Concilia*, cap. i. tit. 'De Treuga et Pace.'

² *Schmidt*, t. iv. p. 232.

ecclesiastical establishments, in laying the foundation and developing the principles of this branch of jurisprudence. He has also called attention to the obstacles placed in the way of its progress by religious intolerance, and the dangerous pretensions of the Popes to decide and determine, not only international disputes, but all questions relating to temporal matters connected with the government of independent States, and the effects of the Reformation in establishing more liberal principles.¹

The
Church in
temporal
matters

§ 11. But, on the other hand, if the intervention of the Papal power in civil affairs were an usurpation of the rights of the public authority, it should be remembered that it is impossible to usurp that which does not exist: a power which is unable to exercise the authority which belongs to it cannot reasonably complain if that authority passes into the hands of others who have the strength and the skill to use it. During this period of history the public authority did not complain of Papal usurpations, but looked upon them as just and legitimate, because they were natural and necessary, brought about by the force of events and the result of the situation of affairs. Certainly, it would now seem extraordinary to see bishops provide for the security of roads, publish edicts against incendiaries and robbers, or against those who cut down olive trees, or who commit other injuries of the kind. But at that time such proceedings were natural and necessary; the ecclesiastical power was struggling against injustice and violence, and endeavouring to substitute in its stead the empire of law and order. Thus the Council of Valentia, in 1129, decrees in its 12th Canon against those who attack the clergy, merchants, pilgrims, and women; the Council of Clermont, in 1130, pronounces in its 13th Canon against incendiaries; the Council of Rheims, in 1157, in the 3rd Canon orders that the clergy, women, travellers, labourers, and vine-dressers should be respected during war; the 11th Council of Lateran, in 1179, in its 24th Canon, excommunicates those who make slaves of, or rob, Christians on voyages of commerce, or plunder the shipwrecked; and the Council of Arbogen, in 1396, directs, by its 5th Canon, that Church burial shall be refused to pirates, incendiaries, highway

¹ Ward, *Law of Nations*, chs. 12 et seq.; but see on this ch. viii. § 31, *post*.

robbers, oppressors of the poor, and other malefactors. Such examples could be multiplied to infinity.¹

Nor has Mr. Ward failed to notice the influence of the Roman law, of the feudal system, of chivalry, of treaties and conventions, and last, though not least, of those twin giants of modern civilisation—commerce and trade, and the maritime and commercial laws resulting from the increased intercourse between the people of different cities and countries.²

§ 12. The Rhodians were among the first to adopt a regular system of laws and regulations relating to maritime trade. The compilation known under the names of *Rhodian Laws*, and *Maritime Laws of the Rhodians*, was probably not intended merely for the Island of Rhodes, or for the inhabitants of the Ægean Sea, but is rather a collection of maritime usages adopted at different periods and intended for different purposes. Some of them, perhaps, preceded the later maritime laws of Rome and of the Eastern Empire. Next to the Rhodian laws are those found existing in the countries of the East conquered by the Crusaders. These have been collected and translated by Pardessus. Next in importance we may mention the collection known as the *Rooles* or *Jugemens d'Oléron*. This collection of maritime customs or laws was prepared from the *Consolato del Mare*, under the direction of Queen Eleanor, Duchess of Guienne, and named from her favourite island, Oléron. It was doubtless revised by her son, Richard I., Duke of Guienne and King of England, for the use of the English maritime courts.³ It was probably intended to serve as a maritime code for the Western sea only. Next in order is the collection called *Jugemens de Damme* or *Lois de Westcapelle*, a compilation of the maritime customs of that part of Europe known at different periods as Belgium, Lower Germany, Netherlands, Flanders, Holland, the United Provinces, &c. The maritime usages known as the *Coutumes d'Amsterdam*, *Laws of Antwerp*, &c., were probably intended exclusively for the northern portion of the Netherlands, and for the navigation of the Baltic and the Sound. The *Leges Wisbuenses*, or *Maritime Law of Wisbuy*, is supposed to

The
Rhodian
laws, &c.

¹ *Balmes*, by Hanford and Kershaw, passim.

² Ward, *Law of Nations*; Fabrot, *Basilica*, tom. vi. p. 647; Manning, *Law of Nations*, p. 11.

³ See on this *The Office of Vice-Admiral of the Coast*, by Sir Sherston Baker. London, 1884 (privately printed).

contain the ordinances made by the merchants and masters of the town of Wisbuy, a city in the Island of Gottland, in Sweden, once a place of great commercial importance, but now in ruins. They were adopted by the Swedes and Danes, and regarded as authority by all the people beyond the Rhine. Many have considered the Laws of Wisbuy as an older compilation than the *Rooles d'Oléron*.¹ The *Assizes of Jerusalem* were framed by Godfrey de Bouillon, at a General Assembly of Lords, after the conquest of Jerusalem, and were principally based on the laws and customs of France.

The Consolato del Mare

§ 13. The *Consolato del Mare* is one of the most curious and venerable monuments of early maritime jurisprudence. Some have given it a very early date, and suppose it to contain the maritime laws and usages of the Greek emperors and of the States and cities bordering on the Mediterranean and adjacent waters. They say it was adopted at Rome as early as 1075, but the researches of Pardessus and others have shown that its origin is much more modern. The first edition which can now be traced was published at Barcelona in 1494. It is regarded by critics as a record of customs rather than an authoritative code of one or more nations. It embraces not only elementary rules for the construction of civil contracts relating to trade and navigation, but also the leading principles then recognised as governing the maritime rights of belligerents and neutrals in time of war. Chapter 273 of the *Consolato* contains many of the materials of the French *Ordonnance de la Marine* of 1681; many of its provisions and precepts are still referred to by writers on international law and by judges of Admiralty and prize courts.

The *Guidon de la Mer* is supposed to have been composed for the benefit of the merchant traders of the city of Rouen, but the name of its author, and the date of its first publication, have not been preserved. It is commented on in Cleirac's work, entitled 'Les Us et Coutumes de la Mer,' which was published in 1647. Some of the maritime laws of France were enacted at a very early period, but there is much difficulty in ascertaining their exact dates. Many of them are incorporated into the above *Ordonnance de la Marine*.²

¹ Selden, *De Dominio Maris*, cap. xxiv.; Azuni, *Droit Maritime*, tom. i. ch. iv.; Story, *Miscellaneous Writings*, p. 100; Pardessus, *Us et Coutumes de la Mer*, tom. i. caps. v.-xi.

² Emerigon, *Traité des Assurances*, pref.; Cleirac, *Les Us et Cou-*

§ 14. The most noted writers, prior to Grotius, on mat- Writers
prior to
Grotius
ters connected with International Law, were Macchiavelli, Victoria, Soto, Suarez, Ayala, Bolaños, Bodinus, Brunus, and Gentilis.

Niccolo Macchiavelli was born at Florence in 1469, and died in 1527. He filled various political offices as Chancellor, Secretary, &c. His principal work, entitled 'Il Principe,' was probably not intended as a mere scientific treatise, but was written for a particular person, and for the purpose of effecting, at the time, a certain definite object. Its character has, therefore, often been misconceived by commentators. Macchiavelli was a man of learning and talents, and his writings on history and politics had no inconsiderable influence upon his own and succeeding ages.

Francisco de Victoria was a professor at the University of Salamanca. His 'Relectiones' were first published at Lyons in 1557; they were thirteen in number, but only the fifth and sixth related to subjects of international law. He died in 1633. Dominico Soto, born in 1494, was a pupil of Victoria, and his successor at Salamanca. His elaborate treatise, entitled 'De Justitia et de Jure,' was published about 1560.

Francisco Suarez was a Spanish Jesuit, and the most acute casuist of his age. He was the first to point out, in his treatise 'De Legibus et Deo Legislatore,' the distinction between natural and consuetudinary law, and to show that international law rested not only on the principles of justice, but also on the usages of nations. He was born at Granada in 1548, and died in 1617. Strange to say, his work is neither mentioned nor referred to by Grotius.

Balthazar Ayala was judge advocate of the Spanish army in the Netherlands under the Prince of Parma, to whom, in 1581, he dedicated his treatise 'De Jure et Officiis Bellicis.' Juan de Hevia Bolanos was a native of Oviedo, in the Asturias, but his celebrated work, entitled 'Curia Philippica,' was written in Peru, and, as he informs us, finished at the city of Los Reyes on Christmas Eve in 1615. It is a work of great learning, and is often referred to on questions of commercial and maritime law. Jean Bodin, or Johannes Bødinus, as he is usually called, was born at Angers, in France, in

tumes de la Mer, pp. 2 et seq.; Boulay-Paty, *Droit Com. Mar.*, tom. i. pp. 59-82.

1530, and died at Laon in 1596. His great work, entitled 'De la République,' was the first attempt at a scientific treatise on politics.

Conrad Brunus was a German civilian. His elaborate treatise, entitled 'De Legationibus,' was first published at Mainz in 1548.

Albericus Gentilis was born in the March of Ancona in 1550, and died in London in 1608. He first studied in Germany, and afterwards went to England, where he filled the chair of jurisprudence in the University of Oxford. His principal treatise, entitled 'De Jure Belli,'¹ was published in 1589, the titles to the chapters of which run almost parallel to those of the first and third books of Grotius. He has the credit of having mapped off the subject, which was afterwards so ably treated of by that eminent founder of international jurisprudence.

To the above list we may add the names of Peckius, a Belgian, who published his 'Ad Rem Nauticam' in 1556, but whose writings were not collected and published together till 1646; of Straccha, an Italian, and Santerna, a Portuguese, whose writings were published in the 'De Mercatura' at Cologne, in 1623.

Writings of Grotius

§ 15. Hugo Grotius, justly regarded as the founder of modern international law, was the most remarkable man of the age in which he lived—an age distinguished for men of genius and learning. He was born in 1583 at Delft, Holland. Being involved in the persecution of the pensionary Barnevelt and the other Arminians, he was imprisoned in the fortress of Louvestein, from which he escaped through the devotion of his heroic wife, and took refuge in France. In 1609 he published his well-known work 'De Mari Libero.' His great work, 'De Jure Belli ac Pacis,' was published at Paris in 1625. He died at Rostock in 1645. This work has been translated into all languages, and has elicited the admiration of all nations and of all succeeding ages. Its author is universally regarded as the great master-builder of the science of international jurisprudence. In addition to his reputation as a writer on public law, he was almost equally distinguished as a statesman, diplomatist, historian, and theologian, and as a

¹ A new edition of this treatise, with a life of the great jurist, was published by Professor Holland, of Oxford, in 1887.

practical lawyer and eloquent advocate. His works on international law have been objected to for the profusion of classical quotations and historical illustrations, but these defects were necessarily incident to the particular period at which he wrote. These objections were answered by himself during his lifetime, and subsequently by the able and eloquent pen of Sir James Mackintosh. A more serious and well-founded objection has been made to his work 'De Jure Belli ac Pacis' (for its want of systematic arrangement, and the introduction of questions and discussions which do not properly belong to the subject.) It is characterised by profound thought, great perspicuity, and the most liberal and enlightened sentiment. Strange, however, as it may appear, the early opponents of his work charged him with attempting to annihilate the three great principles of the Roman law, '*Honeste vivere ; neminem lædere ; suum cuique tribuere.*' But such prejudice and puny opposition were soon overcome when the real character of his writings was understood.

Although Grotius had dedicated his great work on international law to Louis XIII. of France, it was strangely neglected by that king, who gave no reward to the author. Charles Louis, Elector Palatine, was the first prince to appreciate its utility, and ordered it to be publicly taught in his university of Heidelberg. The great Gustavus is said to have found the same pleasure in reading it as did Alexander in perusing the poems of Homer, and honoured the author by calling him to a public employment in Sweden. In 1656 it was taught as public law in the university of Wittemberg, and before the close of the century was universally established as the true fountain-head of European International Law. Grotius wrote during the Thirty Years' War—that fierce struggle for religious and political liberty which was terminated a short time after his death by an honourable peace, based upon the principles which he had so ably and earnestly advocated.

Fifth Period—From the Peace of Westphalia to that of Utrecht.
1648–1713.

§ 16. The Peace of Westphalia, 1648, terminated the long series of wars growing out of the Reformation, and that memorable struggle against the political preponderance of

Political
events of
this period

the house of Austria, which, for thirty years, had devastated Germany and the north of Europe. 'The peace that was at last brought about by necessity,' says Schlegel, 'constituted an epoch in European history. It was a great religious pacification—it was a recognition that to terminate by arms the dispute between the ancient faith and the new doctrines was an impossibility, and it was a settlement of legal relations between the adherents of the one creed and of the other.'¹ It not only gave greater religious tolerance and political liberty to the people of the older States, but also brought into existence new political communities which assumed the position of independent States. It was constantly referred to in subsequent treaties, and continued to form the basis of the conventional law of Europe until the French Revolution.

Although the treaty of Westphalia concluded the war in Germany, it continued to rage in other parts of Europe. The contest between France and Spain was terminated by the treaty of the Pyrenees in 1659; this was followed by the treaties of Oliva and Copenhagen in 1660; that of Aix-la-Chapelle in 1668; that of Nimeguen in 1678; that of Ryswick in 1677; and by that of Utrecht in 1713, which virtually restored the peace of Europe.

Questions
agitated

§ 17. The long and bloody wars which intervened between the Peace of Westphalia, 1648, and that of Utrecht, 1713, and the conventions and treaties by which they were severally suspended or terminated, gave rise to numerous questions of international law, some of which were entirely new in the history of that science. Of the questions particularly discussed we may mention those relating to the independence and sovereignty of States, the liberty of the seas, the interpretation of treaties, the rights of conquest and of pre-emption, the theory of maritime prize, the law of sieges and blockades, the belligerent right of visitation and search, and the treatment due to prisoners of war. In many of these subjects a considerable advance was made from the restricted rules of the *jus gentium* of the Romans, and even from the more liberal principles established by Grotius; but in others the progress of this branch of jurisprudence scarcely kept pace with the increasing civilisation of nations.

¹ Schlegel, *Lectures on Mod. Hist.*, lects. xvii., xviii.

§ 18. The principal writers on constitutional law immediately following Grotius were Selden, Hobbes, Puffendorf, Spinoza, Zouch, Loccenius, Molloy, Jenkins, Cumberland, Wicquefort, Rachel, and Leibnitz. Writers
following
Grotius

John Selden was born in Sussex, England, in 1584, and died in 1634. He wrote a most able work on the law of nations, as derived from the institutions of the ancient Jews, which we have before referred to ; but he is better known by his work entitled 'Mare Clausum,' published in 1635 as an answer to the 'Mare Liberum' of Grotius. Thomas Hobbes was born in Malmesbury, England, in 1588, and died in 1679. His work entitled 'De Cive' was published in 1647. He adopted the absurd theory that a state of nature is one of perpetual war, in which brute force supersedes law and every other principle of action. Samuel Puffendorf was born in Saxony in 1632, and died at Berlin in 1694. He was Professor of Natural Law at Lunden and afterwards Secretary of State at Stockholm. His principal work on public law, entitled 'De Jure Naturæ et Gentium,' was published in 1672. This treatise is far superior to that of Grotius in its plan and the mode of reasoning, but is less practical and original, and his style is too diffuse to be attractive. Baruch Spinoza was of a Jewish Portuguese family, but born at Amsterdam in 1632 ; he died in 1677. He published a number of political and theological essays called *Tracts*, in some of which he treated of questions of international law. He agreed with Hobbes that the natural state of man is one of war, and avowed the detestable maxims that nations are not bound to observe their treaties any longer than it may be for their interest to do so. Richard Zouch was born at Anstey, Wiltshire, in 1590, and died in 1660. He was Professor of Roman Law at Oxford, England, and judge of the High Court of Admiralty. His principal works on public law, written about 1650, were entitled 'De Jure Feciali, sive Judicio inter Gentes,' and 'De Jure Nautico.' His writings are of high authority even at the present day, and are frequently referred to by English judges and publicists, particularly on questions of maritime law. Contemporary with Zouch was the Swedish professor Johannes Loccenius, who wrote in 1651. His principal work, entitled 'De Jure Maritimo et Navali,' is often quoted as authority both by English and Continental writers. He was

born in 1599, and died in 1677. Charles Molloy published the first edition of his work, entitled '*De Jure Maritimo et Navali*,' in 1666, and so popular was the book in England that, in 1769, it had reached the ninth edition. He was a native of Ireland, and died in 1690. Sir Leoline Jenkins was a judge of the High Court of Admiralty, England, and, although he wrote no professed treatise on any branch of public law, his official opinions and his letters (which have since been published) have had great weight with English judges and much influence upon the decisions of the British Courts of Admiralty. He was born in 1625, and died in 1684. Richard Cumberland was born in 1632, and died in 1719. His work, entitled '*De Legibus Naturalibus*,' was published in 1672. Abraham de Wicquefort was born in Amsterdam, in 1598, and died in 1682. His work on the law of diplomacy, entitled '*L'Ambassadeur et ses Fonctions*,' published a short time before his death, is a work of considerable merit. Samuel Rachel was born in 1628, and died in 1691, was a professor in the University of Kiel, and afterwards Minister of the Duke of Holstein-Gottorp, at the Congress of Nimeguen. His work, entitled '*De Jure Naturæ et Gentium*,' was published in 1676, and he was considered in Germany as the founder of a rival sect to Puffendorf. Baron Gottlieb Wilhelm Leibnitz, born at Leipsic in 1646, died in 1716, was the author of numerous works on philosophy and law; his views on international jurisprudence are found scattered through his various publications and correspondence, and more particularly in his '*Codex Juris Gentium Diplomaticus*,' published in 1693.

To the foregoing list other names scarcely less distinguished might be added; but our limits will permit the mention of only a few. Stypmannus published his '*Jus Maritimum*' in 1652; Kuricke published his '*Jus Maritimum Hanseatium*' and other tracts about 1667; and the '*De Navibus et Naulo*' of Franciscus Roccus was first published at Naples in 1655. All the writings of Roccus are regarded as works of great merit. The first mentioned of his treatises has been translated into English by J. R. Ingersoll of Philadelphia, and was published in 1809. Leo von Aitzema is the author of a valuable chronological sketch of events from 1621 to 1668, continued by L. Sylvius to the Peace of Ryswick, 1697. It is entitled '*Saken van Stæt en Oorlagh*' (Matters of State and War).

John Joachim Zentgravius, professor at Strassburg, wrote, about 1678, a work entitled 'De Origine, Veritate, et Obligatione Juris Gentium,' in which he maintained, against Puffendorf, the existence of a positive law of nations. Several writers on Civil law of this period have also discussed questions of international jurisprudence, and especially cases of conflict of laws. Of these we may mention the 'Lois Civiles' of Domat, first published in 1687; 'Prælectiones Juris Civilis,' of Huber, published in 1686-1699; and the 'Commentarius ad Pandectas' by the younger Voet (John), published in 1698. Wiseman's 'Excellence of the Civil Law' was published in London in 1686.

Sixth Period—From the Peace of Utrecht to the End of the Seven Years' War, 1713-1763.

§ 19. The Peace of Utrecht was followed by the maritime war between England and Spain in 1739, which extended to France in 1744; by the continental war which grew out of the disputed question of the Austrian succession: the reigning houses of Bavaria, Saxony, Spain, Sardinia, and Prussia, on the death, in 1740, of Charles VI (the last male descendant of the house of Hapsburg), all claimed, under various pretexts, the entire or considerable portions of the dominions which had so long been united under the Austrian sceptre; and by the Seven Years' War which Prussia waged against the combined forces of Austria, France, and Russia. This protracted and unequal struggle served to develop the military resources of Prussia and to display the brilliant genius of the Great Frederick. These wars were simultaneously terminated by the treaties of Paris and Hubertsburg in 1763.

Political
events of
the
period

§ 20. During this period the celebrated question of the Silesian loan gave rise to important discussions, more especially with reference to belligerent rights, and the effects of a declaration of war upon international obligations previously contracted. France approximated her maritime rules more nearly to those of the 'Consolato del Mare;' while Great Britain attempted to establish the doctrine which has since been denominated the 'Rule of 1756,' and, as subsequently extended and applied, the 'Rule of 1793,' of subjecting to capture in time of war any neutral commerce which is not

Questions
agitated

open in time of peace.¹ Many questions relating to the rights and privileges of public ministers, growing out of the increased intercourse of nations, were also discussed during this period.²

Writings
of
publicists

§ 21. This period was prolific in writers on international law, or on questions intimately connected with this branch of jurisprudence. Among the most distinguished of these writers we may mention the names of Bynkershoek, Wolfius, Vattel, Montesquieu, Heineccius, Barbeyrac, Mably, Emerigon, Valin, Burlamaqui, Pothier, Casaregis, Real, Rutherford, Tindall, Hubner, Abreu, and Dumont.

Cornelius van Bynkershoek was born at Middelburg, in Zeeland, in 1673, and died in 1743. His treatise, entitled 'De Dominio Maris,' was first published in 1702, but the greater part of his works were written after the Peace of Utrecht. His celebrated 'Quæstiones Juris Publici' were published in 1737. He was the most distinguished public jurist of his age, and his works are still referred to as authority on many points. It must be remarked, however, that he attempted to revive the ancient severities of war with respect to the person and property of an enemy, and this portion of his writings not only differs from Grotius, Puffendorf, and others who preceded him, but is rejected by nearly all who have followed him. Christian Frederick Wolf, or Wolfius, as he is usually called, was born at Breslau in 1679, and died in 1754. His treatise called 'Jus Gentium,' being an abridgment of his great work in nine volumes, was published in 1749. A French translation, by M. Formey, was published in 1758, under the title of 'Principes du Droit de la Nature et des Gens.' He was the first to distinguish the law of nations from that part of natural jurisprudence which treats of the rights and duties of individuals. Emmer de Vattel was born in the principality of Neufchâtel in 1714, and died in 1767. His treatise, 'Droit des Gens,' published in 1748, was based on the work of Wolfius, but was a great improvement on the original. Although justly characterised by Mackintosh as a 'diffuse, unscientific, but clear and liberal writer,' and although a large portion of his treatise on the law of nations is taken up with the discussion of questions which do not properly belong to the subject, he is never-

¹ See vol. ii. ch. xxviii. §§ 19, 20.

² Lord Liverpool, *Discourse*; Martens, *Causes Célèbres*, t. ii.

theless referred to as an authority, even at the present day, by judges, diplomatists, and statesmen, more often, probably, than any other writer, not even excepting Grotius. The celebrated French philosopher, Baron Charles de Secondat Montesquieu, published his treatise, entitled 'L'Esprit des Lois,' the same year, 1748, that Vattel published his work on international law. He was born in 1689, and died in 1755. Johannes Gottlieb Heineccius was born at Eisenberg in 1680, and died in 1741. Mackintosh said 'he is the best writer of elementary books with which I am acquainted.' His work on international law, entitled 'Elementa Juris Naturæ et Gentium,' was first published in 1738. Jean Barbeyrac was born at Beziers, in 1674, and died in 1747. He is best known by his translations into French of the works of Grotius, Puffendorf, and Bynkershoek, to which he added very valuable notes. The Abbé Gabriel Bennot de Mably was born at Grenoble in 1709, and died in 1785. Being refused permission to publish in France, his treatise, entitled 'Droit public de l'Europe,' first appeared in Holland in 1746. Balthazar Marie Emerigon was born in Provence in 1716, and died in 1784. Besides his great work on maritime law, entitled 'Traité des Assurances,' he wrote commentaries on parts of the Ordinances of 1681. René Josué Valin was born at Rochelle in 1695, and died in 1765. His 'Commentaire sur l'Ordonnance' was published in 1760, and his 'Traité des Prises' in 1763. J. J. Burlamaqui, an Italian by birth, and Professor of Natural and Civil Law at Geneva, published in 1747 his admirable elementary work, entitled 'Droit Naturel et Politique.' This work was republished in 1810, under the title of 'Principes du Droit de la Nature et des Gens,' with notes by De Felice and Dupin. Robert Joseph Pothier was born at Orleans in 1699, and died in 1772. He was the author of several law treatises which are of the highest authority, and has discussed some of the laws of war, and particularly those of maritime capture, in his 'Traité de Propriété.' J. L. Maria de Casaregis, author of a treatise on maritime law, entitled 'Discursus Legales de Commercio,' was born at Genoa in 1670, and died in 1737. Gaspard de Real's work, entitled 'La Science du Gouvernement,' the fifth volume of which treats on international law, was completed in 1764, though begun at a much earlier period. Thomas Rutherforth (born in 1712, and died in 1771) published in

London, in 1754, his commentaries on Grotius, entitled 'Institutes of Natural Law.' Mathew Tindall (born in 1657, and died in 1733) published his 'Essay concerning the Laws of Nations,' in London, in 1734. Martin Hubner (born in 1725, and died in 1795) published his 'Essai sur l'Histoire du Droit naturel,' in London, in 1757, and his treatise, 'De la Saisie des Bâtimens neutres,' at La Haye, in 1759. Joseph Antonio de Abreu y Bertodano published at Madrid, in 1740, his 'Coleccion de los Tratados de Paz, Alianza, Neutralidad,' from 1598 to 1700. A continuation of this work to 1736 was published in 1796. An abridgment was also published about that time, entitled 'Prontuario de los Tratados de Paz.' Felix Joseph Abreu published at Cadiz, in 1746, a valuable treatise on prizes, entitled 'Tratado Juridico-Politico sobre las Presas.' A French translation of this work was published in 1758, and another in 1802, with notes by Bonnermain. A most valuable collection of treaties and diplomatic papers was made during this period by Jean Dumont, Baron de Carelscoorn. The first four volumes of this work were published in 1726, under the title of 'Corps Diplomatique.' Dumont died in 1827, but four other volumes prepared by him were published after his death by Rousset, who subsequently added a supplement of several more volumes.

Seventh Period—From the Seven Years' War to the French Revolution, 1763–1789.

**Political
events**

§ 22. One of the most important events which occurred in the history of Europe, between the Peace of Paris and Hubertsburg, 1763, and the French Revolution, 1789, was the partition of Poland, or rather the three partitions of that kingdom. The first of these was made in 1772, the second in 1793, and the third, by which the remaining territories of unfortunate Poland were absorbed by Austria, Prussia, and Russia, took place in 1795. The war of Bavarian succession, which occurred in 1778, was terminated by the Peace of Teschen, under the mediation and guarantee of France and Russia, in 1779. This was followed by the mediation of France between the Emperor Joseph II. and the United Provinces, in the question of the free navigation of the river Scheldt, which was settled by the treaty of Fontainebleau, in 1785. In 1788

Prussia interfered in the internal affairs of Holland in favour of William V., and with an army under the Duke of Brunswick overthrew the liberal party, and restored the Stattholder to the plenitude of his authority, which was guaranteed by the triple alliance of 1788 between Great Britain, Prussia, and Holland. This triple alliance interfered between the Emperor Joseph II. of Austria and his revolted subjects in Belgium, at the Congress of the Hague in 1790, forcing the latter to submit to the imperial authority. The same Powers compelled Denmark to withdraw the co-operation she had furnished Russia against Sweden in 1788, and the war was terminated by the Peace of Werela in 1790. The wars between Austria and the Porte, and Russia and the Porte, were also terminated under the mediation of the triple alliance, the former by the treaty of Szistowe in 1791, and the latter by the treaty of Jassy in 1792. But the most important event of this period was the revolt of the British provinces in North America and the war of the American Revolution, in which France afforded material aid to the revolutionary party. This war was terminated by the treaty of Versailles in 1783, by which Great Britain recognised the independence of her revolted colonies, and the United States of America took their place as a sovereign State among the nations of the world.¹

§ 23. The more important questions of international law, Questions
agitated agitated during this period, were those in reference to the rights of sovereignty and independence, arising out of the partition of Poland and the Bavarian succession; the right of mediation, arising out of the interference of the triple alliance in the wars of Russia, Austria, Sweden, Denmark, and the Porte; the right of intervention, arising out of the interference of Prussia in the affairs of Holland, and of the triple alliance in the affairs of Belgium; and the right of revolution, arising out of the revolt of the British provinces of North America. Important questions of maritime jurisprudence were also agitated during this period, such as the rule of *free ships free goods*, which was recognised and attempted to be established by the French Ordinance of 1778; the rights of neutral commerce, declared by the armed neutrality of 1780; and the abolition of privateering, as agreed upon by Prussia and

¹ Ompteda, *Literatur und Völkerrecht*; Graham, *History of the United States*; Bancroft, *History of the United States*.

the United States in the treaty negotiated by Franklin in 1785.¹

Writings
of
publicists

§ 24. The most distinguished writers of this period on questions of international law were the Mosers, Lampredi, Galiani, Martens, Mirabeau, and Bentham.

John Jacob Moser (born in 1701, and died in 1785) published his large and more celebrated work in ten volumes under the title of 'Essay on the Modern Law of European Nations' ('Versuch des Neuesten Europäischen Völkerrechts'); this was commenced in 1777, and completed in 1780. He bases the principles of the law of nations on treaties. His supplementary work, entitled 'Beiträge zu dem Europäischen Völkerrecht,' of which seven volumes had been published in 1781, was never completed. F. C. de Moser published his 'Kleine Schriften,' in twelve volumes, in 1751, and his 'Beiträge zu dem Europäischen Staats- und Völkerrecht,' in four volumes, in 1772. Gio. M. Lampredi, an Italian (born in 1761, and died in 1836) published at Leghorn, in 1778, his 'Juris Naturæ et Gentium,' in which he incidentally considered questions relating to the rights of belligerents and neutrals. This work was severely criticised by the Abbé Galiani. In 1788 he published at Florence another work, entitled 'Commercio dei Popoli neutrali in Tempo di Guerra,' in which he returned the compliment by criticising the work of the Abbé. This latter work, entitled 'Dei Doveri dei Principi neutrali, &c.,' was first published at Naples in 1782. Its author, the Abbé Fernando Galiani, was born in 1728, and died in 1787. Lampredi's second work was translated into French by Jacques Peuchet, and published at Paris in 1802 under the title of 'Du Commerce des Neutres en Temps de Guerre.' George Frederick von Martens was born at Hamburg in 1756, and died in 1821. A syllabus of his lectures at the University of Göttingen on international law was first published in 1785, but this work was afterwards enlarged, and published in French in 1788 under the title of 'Précis du Droit des Gens moderne de l'Europe.' His subsequent works will be noticed in another place. Count Honoré

¹ Wheaton, *Hist. Law of Nations*, pp. 269-328; Franklin, *Life and Works*, vol. ii. p. 448; Russell, *Hist. Mod. Europe*, vol. iii.; Rotteck, *Hist. of the World*, vol. iii.; Sparks, *Dip. Cor. of the American Revolution*; Pitkin, *Civil and Pol. Hist. United States*.

Mirabeau was born in 1749, and died in 1791. His work on the Prussian Monarchy, and his speeches on great national questions during the early part of the French Revolution, have given a world-renown to his name. In his work entitled 'Doutes sur la Liberté de l'Escaut,' he most ably defended the cause of Holland in the question of the free navigation of the Scheldt, which was settled by the treaty of Fontainebleau in 1785. Jeremy Bentham was born in 1749, and died in 1832. His essay on international law was written at various dates between 1786 and 1789, but he never completed the work, these fragments being published at a later period. He is believed to be the originator of the term 'International Law.' His plan for a perpetual and universal peace, although utterly impracticable, has formed the basis of numerous peace societies in England and the United States.

In addition to the foregoing list of distinguished authors, we will briefly refer to a few others who have written on this subject. J. J. Neyron published in 1783 a small work on the principles of the law of nations, which was followed by others. Charles T. Gunther published in 1777 an anonymous work on this subject, which was followed in 1787 and 1792 by the first and second volumes of his 'Europäisches Völkerrecht in Friedenszeiten' ('European Law of Nations in Time of Peace'), a work which he did not live to complete. C. H. van Romer published his 'Völkerrecht der Deutschen' in 1789 at Halle. Fred. Aug. Wm. Wench published the first volume of his 'Codex Juris Gentium Recentissimi' in 1781, and the third in 1796. Schmass published in 1774 his 'Corpus Juris Publici Academicum,' which was augmented by Hommel in 1794. We must not conclude this list without mentioning the name of Benjamin Franklin, the American statesman and philosopher, who wrote against privateering, and was the negotiator of the treaty of 1785 between the United States and Prussia for its suppression. He was born at Boston in 1706, and died in 1790.

From the Beginning of the French Revolution to the Congress of Vienna, 1789-1815.

§ 25. The conflict of opinions and interests growing out of **Political** the events of the French Revolution engendered a war which **events**

soon involved nearly all the nations of Europe, and finally embraced in its tortuous folds the sparsely populated continent of America. It is not necessary to particularise here each separate declaration of war, or to notice the cause which produced it and the treaty by which it was suspended or finally terminated. This contest had its origin in a violation of the rights of independent and sovereign States, by the armed intervention of the allies in the internal affairs of France, on the one side, and by the efforts of the French propagandists, on the other, to revolutionise the governments of other countries. The whole period—from 1789 to 1815—is marked by encroachments on the true principles of international law, and a total disregard of the rights of the smaller States was manifested by the treaties of Paris and Vienna, by which the peace of Europe was restored. The war of 1812 between the United States and Great Britain originated in alleged violations of the maritime law of nations, by the capture and confiscation of American vessels engaged in neutral trade, and the impressment of American seamen on the high seas, by British cruisers searching for British subjects by virtue of the municipal laws of Great Britain. This war was terminated by the treaty of Ghent in 1814 on the basis of the *status quo ante bellum*, leaving undecided the questions in which it originated.¹

Questions
agitated

§ 26. The political discussions of this period embraced almost the entire range of diplomacy, and questions were agitated respecting nearly every established principle of the law of nations. Among those of most interest we may mention the right of armed intervention in the internal affairs of independent sovereign States, growing out of the French Revolution in 1789; the rights of war with respect to private property on land, including booty, pillage, and military contributions; the rights of military occupation and conquest; the law of sieges and blockades; the treatment due to prisoners of war, with the right and duty of exchange; and the general rules which should regulate the pacific intercourse of belligerents. The controverted questions of

¹ Russell, *Hist. of Mod. Europe*, vol. iv. pp. 350–490; Wheaton, *Hist. Law of Nations*, pp. 345, 425; Mackintosh, *Miscell. Works*, pp. 461–465; Jomini, *Les Guerres de la Révolution*; Jomini, *Vie Pol. et Mil. de Napoléon*; Alison, *Hist. of Europe*; Armstrong, *Notices of the War of 1812*; see also vol. ii. ch. xxvii. § 29.

maritime law included almost every right of neutral commerce ; the term ' contraband of war ' was extended to include nearly everything in which a neutral could trade with profit ; whole coasts were blockaded by mere decrees and orders in council ; colonial and coasting trade was closed to neutrals, their vessels were searched, and their seamen impressed, in virtue of merely local and municipal laws. In fine, every imaginable pretext was resorted to in order to destroy the commerce of neutral States or to force them to join the dominant maritime Power of Europe.¹

§ 27. This was eminently a period of action and of great events, rather than of calm discussion and philosophical investigation. Although questions of international law were frequently discussed with learning and ability in diplomatic correspondence and State papers, the works of professed text-writers on this branch of jurisprudence were neither very numerous nor of a very marked character. Nevertheless there were published during this period a number of works worthy of particular notice, and among the authors who wrote or published at this time we may mention Azuni, Martens, Kant, Koch, Savigny, Ward, Mackintosh, Dou, Flassan, Rayneval, &c.

Writings
of
publicists

Domenico Alberta Azuni, a native of the island of Sardinia (died 1827), published his ' Sistema universale dei Principii del Diritto marittimo dell' Europa ' in 1795 ; but the work was afterwards remodelled and enlarged, and published in French in 1797 under the title of ' Droit maritime de l'Europe.' A translation by Mr. Johnson was published in New York in 1806. George Frederick von Martens, who has already been mentioned, published during this period several important works connected with diplomacy and the treaties celebrated between the different States of Europe, being an ' Essai concernant les Armateurs, les Prises et surtout les Reprises,' in 1795, the ' Cours Diplomatique,' in 1801, and the ' Recueil des principaux Traités . . . conclus par les Puissances de l'Europe,' completed in the same year. The great German philosopher, Emanuel Kant (born 1724, died 1804), as a writer on international law properly belongs to this period, although a portion of his works were published at an earlier date. That part of his works relating to the law

¹ Napoleon, *Memoirs dictated at St. Helena.*

of nations was translated into French and published in Paris in 1814 under the title of 'Traité du Droit des Gens.' Like Bentham, he advocated a project of perpetual peace, founded upon a confederation of free States. His principles have been ably contested by Hegel. Christopher G. Koch, a native of Alsace (born 1737, died 1813), published in 1796 his 'Abrégé de l'Histoire des Traités de Paix.' This was followed by other historical collections. Frederick Charles Savigny, a native of Frankfort-on-the-Maine (born 1779), belonged to what is called the historical school of German lawyers. His work on the 'Law of Possession' was written in 1803, but his 'History of the Roman Law in the Middle Ages' was not published till 1815. All his writings are rather of a historical than a philosophical character. Robert Plummer Ward, an English author (born 1765, died 1846), published, in 1795, his 'History of the Law of Nations in Europe,' from the time of the Greeks and Romans to the time of Grotius; it is a work of great ability. Sir James Mackintosh, another English writer of note, delivered a course of lectures, in 1797, in Lincoln's Inn Hall, on the 'Law of Nature and Nations;' but the subject being unattractive to an English auditory, only the 'Introductory Discourse' was published. It is found in his 'Miscellaneous Works,' and contains an admirable review and criticism of the works of other publicists. Don Ramon Lázaró de Dou y de Bassols, a Spanish author, published in 1802 his work entitled 'Instituciones del Derecho Público General.' J. M. Gérard de Rayneval, a native of Alsace (born in 1736, died 1812), first published his work, entitled 'Institutions du Droit de la Nature et des Gens,' in 1803. M. de Flassan, a native of France, published in 1811 his 'Histoire générale de la Diplomatie Française,' and in 1814 his 'Histoire du Congrès de Vienne.' Thomas Hartwell Horne, an English author, published in 1803 a 'Compendium of Admiralty Decisions,' and subsequently a 'Treatise on Diplomacy.' J. Jouffroy published, in 1806, his 'Droit des Gens maritime universel.' F. J. Jacobson published, in 1804, his 'Handbuch über das praktische Seerecht,' &c., and in 1815 his work entitled 'Seerecht des Kriegs und des Friedens,' &c. A translation of this work, by William Frick, was published in Baltimore in 1818. J. N. Tetens published, in 1805, a work on the reciprocal rights of

belligerents, and in 1811 Count Merlin published his valuable 'Répertoire,' which has since been greatly enlarged. De Steck published in 1790 his 'Essay sur les Consuls.' Warden, United States consul-general in France, published in 1815 a valuable work on the same subject, which was translated into French by Barrère. John E. Hall published in Baltimore in 1809 a treatise on 'Admiralty Practice,' in which he embodied a translation of Clerke's 'Praxis,' which was first published in Latin in 1679. Robinson published his 'Collectanea maritima' in London in 1801. Marin published his 'Derecho Natural y de Gentes' in 1800.

§ 28. But any deficiency in the number and character of ^{Judicial} professed writers on public law during this period is more ^{decisions} than compensated for by the decisions of judicial tribunals on questions of international law, and more particularly of the maritime law of nations, the judgments being often characterised by profound learning and great legal ability. Of the English judges of Admiralty and prize, Sir William Scott, afterwards Lord Stowell, was unquestionably the most able and the most distinguished. Mr. Duer very justly remarks: 'In the same sense in which Lord Mansfield is usually termed the father of commercial law in England, Sir William Scott may be justly regarded as the founder of the law of maritime capture. Its principles, it is true, had been stated by the great writers on public law—Grotius, Puffendorf, Vattel, and Bynkershoek—but they were stated in terms so loose and general as rendered them too liable to be differently understood and applied by different nations.' It is by a series of judicial decisions of prize-courts of England and of the United States, and principally by those of Sir William Scott, that these principles have been rendered clear, definite, and stable; they have been rescued from the domain of theory, and by successive elucidations and varied illustration have been expanded and wrought into a consistent, harmonious, and luminous system. The opinions of Sir William Scott are those, not merely of a jurist, but of a scholar, philosopher, and statesman; and they are as much distinguished by the beauties of their composition as by their sagacity and learning and comprehensive views.¹

¹ Duer, *On Insurance*, vol. i. pp. 746, 747; Manning, *Law of Nations*, pp. 45-47; Hoffman, *Legal Studies*, vol. ii. pp. 458 et seq.

Ninth Period—From the Congress of Vienna to the Treaty of Washington, 1815–1842.

**Political
events**

§ 29. Europe, exhausted by the great wars of the French Revolution and Empire, which were terminated by the treaties of Paris and Vienna in 1814 and 1815, enjoyed a long period of general peace, interrupted only by the internal revolutions of Greece, France, Belgium, Poland, and the war between Russia and the Porte, which was terminated by the treaty of Adrianople in 1829. These wars, however, were too limited in their extent and too temporary in their character to disturb the general tranquillity of nations. The lessons of the past had taught the Allies the impolicy of dictating to others the form and character of their government or the person of their ruler, and when France in 1830 revolted and dethroned her king, again exiling the Bourbons whom the Allies had forced her to receive in 1815, she was permitted to form her own government and select her own sovereign without molestation or foreign interference. The same regard for the principles of international law, and the rights of sovereign States, was not shown in some other cases : but the right of intervention in the internal affairs of other States, where not justified or required by existing treaties, was not only not claimed, but expressly denied by British statesmen. In America during this period the Spanish and Portuguese provinces, following the example of their northern neighbours, revolted against the governments of the mother countries, and, after a contest of many years, succeeded in establishing their independence, and assumed the position and rank of sovereign States. The United States, profiting by the long peace to people her wide domain by European immigration, and to build up her commercial marine by unrestricted trade with other countries, rapidly became a formidable rival to the great maritime Powers of Europe. But the treaty of Ghent had left undecided the important questions which had been involved in the war with Great Britain in 1812, and new causes of difficulty were continually arising between the two countries, which caused a widespread belief that war was almost inevitable. But cooler and wiser counsels prevailed, and most of the points of

dispute were happily settled by the treaty of Washington in 1842.¹

§ 30. The more important questions of international law, **Questions agitated** agitated during this period, were the right of armed intervention, as in the case of Naples, Spain, Greece, and Belgium ; the right of forcible annexation, as in the case of the kingdom of Poland ; the internal and external rights of confederated States, as in the case of the Germanic and Swiss Confederations ; the rights of sovereign and independent States to change their government, as in the case of France, Belgium, &c. ; the free navigation of great rivers which divide or run through different States, as the Rhine, the St. Lawrence, the Mississippi, &c. ; the right of territorial jurisdiction over inland waters, as the Black Sea, the Dardanelles, the Bosphorus, &c. ; the right of colonial revolution and independence, as in the case of Mexico and the Spanish and Portuguese provinces of South America ; the right of visitation on high seas in time of peace to search for slavers ; and the case of the destruction of the United States steamer 'Caroline' by British forces. Another question agitated during this period, and most warmly discussed in the British Parliament, was the right of the people of one State to assist, in time of peace, the insurgent colonies of another State. This question arose with respect to the expeditions fitted out in England in aid of the insurgents of Spanish America—expeditions similar in character to those which in the next period were organised in the United States, and generally known as 'filibuster expeditions.' Laws were passed, nominally to prohibit them, but these laws were a mere dead letter upon the statute-books.²

§ 31. Among the authors of this period who have treated **Writings of publicists** of matters connected with international law, we may mention the names of Kamptz, Kluber, Hegel, Wheaton, Kent, Story, Manning, Bello, Pfeiffer, C. D. Martens, Garden, Pardessus, &c.

¹ Alison, *Hist. of Europe*, second series ; Capefigue, *Hist. de la Restauration* ; Capefigue, *L'Europe depuis l'Avènement du Roi Louis-Philippe* ; see ch. xiv. § 20.

² Wheaton, *Hist. Law of Nations*, pp. 425-758 ; Alison, *Hist. of Europe*, ch. lxvii. §§ 47-91 ; Alison, *Hist. of Europe*, second series, ch. iv. §§ 103-106. As to the law at the present day on this subject, see the British Foreign Enlistment Act (1870), and the remarks in vol. ii. ch. xxiv. § 14.

C. A. von Kamptz published at Berlin, in 1817, his 'Neue Literatur des Völkerrechts.' It is a continuation of the work of Ompteda, and the two form a valuable history of the law of nations. Jean Louis Kluber (born 1762, died 1837) first published his 'Droit des Gens moderne de l'Europe' in 1819; a German edition, entitled 'Europäisches Völkerrecht,' was published in 1821, and an enlarged edition of the French work in 1831. Kluber was the author of numerous other works connected with international jurisprudence. George William Frederick Hegel, a native of Stuttgart (born 1770, died 1831), was the author of a number of works on philosophy and law, in one of which he most ably refutes the political theories of Kant. His 'Elements of Right, or the Basis of Natural Law and Political Science' ('Grundlinien des Rechts, oder Naturrecht und Staatswissenschaft in Grundrisse'), was published at Berlin in 1821. Henry Wheaton, an American author (born 1785, died 1848), published the first edition of his 'Elements of International Law' in 1836. This work was greatly enlarged by Wheaton, in three subsequent editions, the last being in 1847.¹ He had previously written on the 'Law of Captures,' and subsequently he published several important works on international jurisprudence. James Kent, another American writer (born 1763, died 1847), published, in 1826, the first volume of his 'Commentaries on American Law,' which briefly, but most ably, discusses the fundamental principles of international law; the entire work was not completed till 1830. Joseph Story, one of the justices of the Supreme Court of the United States (born 1779, died 1845), published, in 1834, his 'Commentaries on the Conflict of Laws,' in which he examines many important questions of international jurisprudence. William Oke Manning, an English author, published, in 1839, his excellent work, entitled 'Commentaries on the Law of Nations.' Andrés Bello, a native of Venezuela, published, in 1832, in Chili, a valuable and able elementary work, entitled 'Principios del Derecho Internacional.' B. W. Pfeiffer published, in 1819, his 'In wie fern sind Regierungshandlungen,' &c., and in 1823-1841 his 'Das Recht der

¹ This work was afterwards edited by William Beach Lawrence (see p. 34), and by Richard Henry Dana, jun. (see p. 43). A new edition was published by M. Geffcken in 1866, and another by Mr. A. C. Boyd in 1878.

Kriegseroberung,' &c. These works are valuable for containing learned discussions of certain questions not treated of in other modern works on public law. Charles de Martens published his 'Manual Diplomatique' in 1822, his 'Causes Célèbres du Droit des Gens' in 1827, and his 'Guide Diplomatique' in 1832. He is also the author of several other works. Count de Garden published his 'Traité complet de Diplomatie' in 1833. J. M. Pardessus commenced, in 1828, the publication of his 'Collection de Lois maritimes,' but the entire work was not completed till 1845. The first of two volumes was subsequently published separately, under the title of 'Us et Coutumes de la Mer.' P. S. Boulay-Paty published, 1821-3, his 'Cours de Droit commercial maritime.' Count d'Hauterive and Baron de Cussy began, in 1834, the publication of their 'Recueil des Traités de Commerce.' Professor de Felice published, in 1830, his 'Leçons de Droit de la Nature et des Gens.' Professor Cotelle published, in 1819, a volume entitled 'Droit de la Nature et des Gens.' Frederick Saalfeld published, in 1833, his 'Handbuch des positiven Völkerrechts,' an elementary work of considerable merit. The posthumous work of G. de Wal, entitled 'Inleidning tot de Wetenschap van het Europeesche Volkenregt,' was published in 1835. M. Schafner's work, on the 'Development of Private International Law' ('Entwicklung des Internationalen Privatrechts'), was published in 1841. H. Ahrens's 'Cours de Droit naturel' was first published in 1840; it soon passed through several editions, and was translated into various languages. M. S. F. Schoel published, in 1817 and 1818, his 'Histoire abrégée des Traités de Paix.' Laget de Podio published, in 1826, his 'Juridiction des Consuls de France.' Borel published, in 1831, an enlarged edition of his work, entitled 'De l'Origine et des Fonctions des Consuls,' which originally appeared in Russia in 1837. The fourth volume of Alexander de Miltitz's 'Manuel des Consuls' appeared in 1839; the death of the author prevented the completion of the work. José Ribiera dos Santos and José Feliciano de Castilho-Barreto published, in 1839, a valuable work in two volumes, entitled 'Traité du Consulat.' Schmolz published, at Berlin, in 1817, his 'Europäisches Völkerrecht.' Gagern published, at Leipsic, in 1840, a work entitled 'Critik des Völkerrechts.' Mirus published, at the same place, in 1838, his work, entitled 'Das

Seerecht,' &c. Pitkin's 'Political and Civil History of the United States' was published in 1828.

Some of the historical writers of this period have discussed, incidentally, but with marked ability, some of the great questions of international law which grew out of the memorable wars following the French Revolution. Among the historical writings of this character we may mention those of Baron Jomini, Mathieu Dumas, Foy, Thiers, Clausewitz, Koch, Burlow, the Archduke Charles, Napier, Pelet, Guvion Saint-Cyr, and Suchet. The 'Mémoires' dictated by Napoleon at St. Helena to Gourgaud, Montholon, and others contain many striking remarks upon questions of international law which had been agitated in Europe during his reign.

Tenth Period—From the Treaty of Washington to the Civil War in the United States, 1842–61.

**Political
events**

§ 32. Among the most important events which occurred in Europe during this period, we may mention the expulsion from France of the younger house of the Bourbons, the restoration of the family of the Bonapartes, and the establishment of the Imperial Government of Napoleon III.; the abortive attempts at insurrection and revolution in Italy; the revolt in Hungary and the complete subjugation and absorption of that nation by Austria, through the assistance and armed intervention of Russia; the Crimean war between Russia on one side, and France, Great Britain, Sardinia, and the Porte on the other; the Italian war between Austria and the allied forces of France and Sardinia, and its appendix, the revolution and consolidation of Italy.

The wars waged by France in Africa, by Russia in Asia, by Great Britain in India, and by France and Great Britain in China and Syria, and by Spain against Morocco, do not properly come within the limits of this historical sketch. In America the most noted events were the revolt of Texas from Mexico and its voluntary annexation to the United States, and the war which resulted therefrom between the two republics. This war was terminated by the treaty of Guadalupe Hidalgo in 1848, by which Mexico ceded to the United States a large portion of her territory. The restoration of peace was followed by the disbanding of large bodies of undisciplined

troops, whose restless spirits, under the leadership of designing and unprincipled men, sought occupation in the lawless and disastrous expeditions which were fitted out in different parts of the United States against Cuba, Lower California, Sonora and Nicaragua, generally known by the name of *Filibuster Expeditions*.¹

§ 33. The more important questions of international law ^{Questions agitated in America} agitated during this period in America were—the right of jurisdiction over arms of the sea, arising out of the fishery question on the north-eastern coast adjacent to the British and American possessions; the rights of secession and annexation, as in the case of Texas; the rights of military occupation and of conquest, as in the case of Mexican ports and in territories possessed by, and ceded to, the United States; the rights of neutrality and of embassy, as in the case of British enlistments in the United States, and the consequent dismissal of the British minister and consuls; the character of unauthorised military expeditions by citizens of one State against those of another when the governments of the two countries are at peace with each other, as in the case of the various filibuster expeditions upon Cuba, Mexico, and Central America; the proposed treaty for the protection of Cuba, and a guarantee by Great Britain, France, and the United States of the *status quo* in the West Indies; thus introducing into America the principle of supervision, intervention, and balance of power which now prevails in Europe; and the right of intervisitation of ships on the high seas in time of peace for the suppression of the slave trade.²

§ 34. The questions of international law most agitated ^{Questions agitated in Europe} during this period in Europe were those respecting the right of armed intervention by one State in the internal affairs of another, arising out of the revolutions in France, Italy, Germany, and Hungary; the preservation of the balance of power in Europe, arising out of the encroachments of Russia upon the territory of the Ottoman Porte, and her manifest intention to enlarge her dominions by the absorption of

¹ *Presidents' Messages and Congress Documents on the War with Mexico.*

² Phillimore, *On Int. Law*, vol. i. pp. 465, 466; Marcy, *Dip. Correspondence*, Cong. Docs.; Everett, *Letter of Dec. 1st, 1852*, Cong. Docs.; *Presidents' Messages*, Dec. 1856-57-58; Wheaton, *Elem. Int. Law*, pt. ii. ch. i. § 3, note.

Turkey ; and similar encroachments of Austria in Italy ; the law of sieges and blockades, the rights and duties of neutrals, the question of contraband, of neutral goods in enemy ships, and of enemy goods in neutral ships, arising out of the war of the Crimea between Russia and the Western Powers ; the right of foreign enlistment in neutral territory and the rights and duties of embassy, as in the case of the British minister and consuls in the United States, and of the British minister in Spain ; the abolition of privateering, and the general policy of changing the conventional law of nations with respect to maritime capture so as to conform to the modern rules of war upon land, as proposed by the United States to the maritime States of Europe ; the rights of belligerents on land, and of conquest, as in the Italian war, and the cession to France and transfer to Sardinia of Lombardy ; and the rights of other sovereign and dependent States of Italy as connected with the right of intervention and the equilibrium of power in Europe.¹

Writings
of
publicists

§ 35. This period was exceedingly prolific in works professedly devoted to international law, or which treat of subjects connected with that branch of legal science. We will proceed to mention some of the more important of these publications.

Henry Wheaton published in 1842 his essay on the 'Right of Visitation and Search,' and in 1845 his 'History of the Law of Nations,' based on a memoir previously published in French and submitted to the Institute of France. James Reddie published in 1842 his 'Inquiries in International Law,' and subsequently his 'Researches, Historical and Critical, in Maritime International Law.' Archer Polson in 1848 published a work entitled 'Principles of the Law of Nations.' Richard Wildman published in 1849 a valuable work entitled 'Institutes of International Law.' John Westlake published in 1858 a most excellent 'Treatise on Private International Law,' and in 1890 a larger edition of the same. Wm. Beach Lawrence published in 1855 and in 1863 an edition of Wheaton's 'Elements of International Law,' with introductory remarks and valuable notes ; in 1859 an essay or historical sketch of the right of 'Visitation and Search' ;

¹ Marcy, *Letter to Count Sartiges, Cong. Doc.* ; Webster, *Works of*, vol. vi. pp. 488-506.

and in 1868–1880 ‘Commentaries on the Elements of International Law, and on the History of the Progress of the Law of Nations.’ This eminent American lawyer was born at New York in 1800, and died in 1881. Sir Robert Phillimore, who died in 1873, published in 1847 a valuable work entitled ‘The Laws of Domicile,’ and in 1854–6, and again in 1871–3, his learned and elaborate treatise entitled ‘Commentaries of International Law,’ which erudite publication is continued by his son, Sir Walter Phillimore. Sir George Bowyer published in 1854 his ‘Commentaries on Universal Public Law,’ in which many questions of international law are fully discussed. He died in 1883. Of Continental works we may mention the following :

Lawrence Basil Hautefeuille, of Paris (born in 1805, died in 1875), published his valuable work entitled ‘Les Droits et Devoirs des Nations neutres en Temps de Guerre maritime’ in 1847–9 ; it was followed by three editions, the last being in 1868. Théodore Ortolan published, in 1845, ‘Règles Internationales et Diplomatie de la Mer.’ Eugène Ortolan published in 1845 ‘Des Moyens d’acquérir le Domaine International.’ Foelix published in 1843 his ‘Traité du Droit International Privé.’ A new edition of this work was published by Charles Demangeat, at Paris, in 1858. G. Massé published in 1844 his work entitled ‘Le Droit Commercial,’ &c. A. de Pistoye and Charles Duverdy published, in 1855, their elaborate work entitled ‘Traité des Prises Maritimes.’ Baron Ferdinand de Cussy published his ‘Dictionnaire du Diplomate et du Consul’ in 1846 ; his ‘Règlements Consulaires’ in 1851 ; his ‘Phases et Causes célèbres du Droit Maritime des Nations’ in 1856 ; and his ‘Précis historique des Evénements politiques’ in 1859. Louis Pouget published, in 1858, ‘Principes de Droit Maritime’ ; and the same year Aldrick Caumont published his ‘Dictionnaire universel du Droit Maritime.’ J. Bedarride published his ‘Droit Commercial’ in 1859. Two Spanish works published during this period are worthy of particular notice. The posthumous work of José Maria de Pando, who died in 1840, was published at Madrid in 1843 under the title of ‘Elementos del Derecho Internacional,’ and in 1849 Don Antonio Riquelme published his ‘Elementos del Derecho Público Internacional.’ Silvestre Pinheiro-Ferreira, a Portu-

guese by birth, published in 1845 his 'Cours du Droit public.' He was the author of numerous articles in the French 'Revue Etrangère de Législation,' and of notes on Vattel and Martens. The various memoirs of Professor Putter, of the University of Greifswald, on questions of international law were collected and published in 1843, under the title of 'Beiträge zur Völkerrechts-Geschichte und Wissenschaft.' A. W. Heffter published in 1844 a work on international law entitled 'Das Europäische Völkerrecht der Gegenwart;' the sixth edition was compiled in 1873. French editions of this well-known work, under the title of 'Le Droit International Public de l'Europe,' were published in 1863 and subsequently. He was born at Schweinitz in 1796, and died in 1880. Mensch published, in 1846, his 'Manuel pratique du Consulat;' and Moreuil, in 1850, his 'Manuel des Agents consulaires.' Alexander de Clercq published, in 1851, a 'Guide pratique du Consulat,' which was followed by a 'Formulaire des Chancelleries'; new editions of both these valuable works were published in 1869 and 1868 respectively. Count de Garden commenced, in 1850, the publication of his voluminous work entitled 'Histoire générale des Traités de Paix.' C. Von Kalternborn published, in 1847, a work entitled 'Critik des Völkerrechts,' and in 1848 another entitled 'Zur Geschichte des Natur- und Völkerrechts.' A. Villefort's pamphlet on 'Privilèges Diplomatiques,' published in 1858, is a work of much merit. A French edition of the Italian work of Ferdinand Lucchesi-Palli was published in 1842, under the title of 'Principes du Droit Public Maritime.' H. B. Oppenheim published at Frankfort in 1845 a manual on international law entitled 'System des Völkerrechts.' Mirus published in 1847 a work entitled 'Das Europ. Gesandtschaftsrecht.' Gardner published in 1860 his 'Institutes of International Law.' Theodore Dwight Woolsey (born at New York, 1801) published his 'Introduction to the Study of International Law' in 1860, and other editions of the same in 1874 and in 1879. He was elected President of Yale College in 1846. Leopold Neumann, of Vienna, published his 'Handbuch des Consulatwesens' in 1854; also 'A Collection of Austrian Treaties from 1763 to 1856,' and a 'New Continuation to the Collection of Treaties' to the end of 1877. He died in 1889. Augustus Bulmerincq,

of Wiesbaden (born in 1822), published his 'Die Systematik des Völkerrechts von Hugo Grotius bis auf die Gegenwart,' or 'The System of the Law of Nations from Hugo Grotius up to the Present Time,' in 1858; 'Praxis, Theorie und Codification des Völkerrechts,' or 'Practice, Theory, and Codification of the Law of Nations,' in 1874, as well as a number of articles in the 'Encyclopædia' of M. de Holtzendorff. Other authors of treatises on particular branches of jurisprudence—as insurance, commercial and mercantile law—have incidentally discussed certain questions of an international character with learning and ability. Among these we may mention 'The Law and Practice of Maritime Insurance,' by John Duer, published in 1846, which contains a very complete summary of the decisions of the prize-courts of England and America on maritime captures.¹ Of the judicial opinions collected and discussed in Mr. Duer's work there are none of more marked ability than those delivered by Chief Justice Marshall and Mr. Justice Story in the Supreme and Circuit Courts of the United States. The decisions of these two eminent judges on questions of international law, and more particularly of maritime capture, rank at least next to those of Sir Wm. Scott, and on some points they are regarded in the United States as the better authority. It was in this period that the term 'Private International Law'—a most misleading nomenclature—was first coined.²

§ 36. Some of the numerous and important questions of international law which have been agitated within the last thirty years are treated of in the text-books to which we have just referred, but many of them are scarcely alluded to, and some are not mentioned at all. We find some able and valuable discussions of various events of the Crimean and Italian wars, and of the questions to which they have given rise, in the diplomatic correspondence and parliamentary

¹ It is proper to remark that, with regard to the dates of the births, deaths, and publications of many of the authors referred to in the foregoing pages, there are numerous conflicting statements in biographical and bibliographical dictionaries. Halleck followed those which he believed to be the best authorities, although, in a few cases, there is some cause to doubt their correctness.

² 'It is most important,' says Professor Holland (*Elements of Jurisprudence*, 347), 'for the clear understanding of the real character of the topic which, for the last forty years, has been misdescribed as "private international law," that this barbarous compound should no longer be employed.'

debates of the same period. In fact, international law has been very much popularised during this period ; its principles are more generally acknowledged, and its authority is more frequently invoked by diplomatists, statesmen, and legislators. This is especially the case in the United States and Great Britain. In proof of the remark we need only refer to the admirable State papers of the American Secretaries, Webster and Marcy, and to the more recent debates by Lyndhurst, Palmerston, Russell, and others in the British Parliament, on the rights and duties of neutrals, the law of allegiance and protection, the right of intervention, the maritime right of visit in time of peace. The diplomatic papers of Napoleon III. on Italian affairs are most able productions.

Eleventh Period—From the Civil War in the United States to the end of 1891.

**Political
events**

§ 37. This epoch witnessed the Civil War in the United States, followed by the defeat of the Southern States or Confederate Government in 1865 ;¹ the Schleswig-Holstein affair of 1864, and the subsequent war of 1866 between Prussia and Austria, ending in the latter Power being obliged to relinquish all connection with the German Confederation ;² the Franco-

¹ In 1861 the United States of America separated into two independent Republics. South Carolina, by a vote of a convention, proclaimed her resumption of independence as a sovereign State. Mr. Jefferson Davis, formerly Secretary of War, was elected the first President of the Confederate States, which first consisted of South Carolina, Georgia, Alabama, Florida, Louisiana, and Texas. Other States subsequently joined them, to the number of five or six. Great Britain, in concert with France, determined to recognise both parties as belligerents, and not to regard the Confederate States as mere rebels ; but, in order to discourage privateers, all British ports were closed to prizes taken at sea. Upwards of 2,000 battles were fought. A remarkable incident of this war is the first sea-fight between iron-clad ships. The 'Virginia' (or 'Merrimac'), having been coated with iron rails by the Confederates, destroyed several wooden men-of-war of the enemy, and dispersed their transport ships. The 'Merrimac' was attacked by the 'Monitor,' an iron-clad vessel of the Federal Government, but, after an engagement of five hours, having received a shot in her armour, she was obliged to retire from the contest. On May 26, 1865, the Confederate Government was entirely defeated, and the Civil War brought to a close. The British and French Governments rescinded their recognition of the Confederate States as belligerents. The United States Government granted an amnesty to the Confederates, and released all prisoners on parole, after they had taken the oath of allegiance.

² In 1864 Prussia and Austria invaded Schleswig-Holstein. Meanwhile a conference was convened in London to attempt to settle a new line of demarcation, but without success. On June 25 the Prussians took

German war of 1870, commenced by France, nominally with regard to the candidature of the hereditary Prince of Hohenzollern for the throne of Spain, which resulted most disastrously for the former country, the French being severely defeated and a great portion of Alsace and Lorraine annexed to Germany;¹ the Bulgarian atrocities perpetrated under the feeble rule of Turkey; the Andrassy Note of 1876; the abortive Conference of Constantinople of 1876; the Treaty of San Stefano, 1878, containing many provisions which were a reversal of the Treaty of Paris, 1856; the Treaty of Berlin,

possession of the Isle of Alsen, the Danes were defeated, and the Danish Government was subsequently required to surrender Schleswig-Holstein and Lauenberg to the allies. By the Convention of Gastein, Schleswig was to be governed by Prussia, and Holstein by Austria. A dispute soon arose between Prussia and Austria, terminating in the war of 1866, in which Prussia took possession of both Duchies without difficulty. In this war the Prussians were signally victorious, and finally defeated the Austrians in the battle of Sadowa, who, by the terms of peace, were obliged to relinquish all connection with the German Confederation. Prussia, moreover, by this war annexed Hanover, Hesse-Cassel, Nassau, and Hesse-Darmstadt, and the city of Frankfort, and assumed military and diplomatic power to the north of the Main.

¹ In 1870 the Franco-German war commenced, nominally on account of the refusal of the King of Prussia to make certain promises with regard to the candidature of the hereditary Prince of Hohenzollern for the throne of Spain, but it was, in fact, a culmination of a mutual hatred and rivalry which had for several years past been growing up between France and Prussia. War was declared by France, and a small victory was at first gained by her arms at Saarbrück on August 2, but here the tide turned. At Wissembourg, on August 5, the French general Douay was killed and his troops routed; at Wörth, on August 6, after fighting most bravely under Marshal MacMahon, the French were put to flight, leaving an immense amount of ammunition and stores on the field. After this victory the German army, finding the passes of the Vosges completely undefended, marched without opposition on Paris. The victories of Spicheren, near Saarbrück (August 6), Rezonville (August 16), Gravelotte (August 18), and Mouzon (August 30) followed, Nancy having submitted to the Crown Prince. On September 2 the battle of Sedan was fought, and Napoleon III., with 100,000 men, forced to surrender to the King of Prussia. The capitulation of Strasbourg, Toul, Orleans, Metz, Thionville, Phalsbourg, and Montmédy followed at short intervals. On November 10 the army of the Loire, under General d'Aurelle des Paladines, gained the sole French victory during the war, at Coulmiers. Rouen, Amiens, and Orleans were occupied by the German soldiers. In November some French troops, assisted by Pontifical Zouaves under General Charette, attempted to open the road to Paris, then invested by the enemy, but were defeated at Beaume-la-Rolande. In the following year the French were defeated at Le Mans, as also in various small engagements. Finally, on January 28, Paris capitulated to the German army. On February 26 the preliminaries of peace were signed at Versailles, by which (*inter alia*) Alsace, with the exception of Belfort, and Metz with part of Lorraine, were annexed to Germany, and France compelled to pay 200,000,000*l.* by instalments ranging over three years.

1878, by which the independence of several of the Turkish provinces was assured. The consequences of the reception of a Russian envoy by the Ameer of Afghanistan in 1878, while a British envoy was refused, were a long and harassing war between Great Britain and that country, in the course of which General Sir Frederick Roberts marched into the territory and took possession of Cabul ; the Ameer abdicated and was sent to India.

The bombardment of Alexandria in 1882 by the British fleet, and the landing of British troops in Egypt to secure order in that country, followed by the capture of Arabi, the leader of the rebellion against the nominal suzerainty of the Porte, who, being tried by a special commission for mutiny, treason, and violation of the laws of war, was found guilty and sentenced to death, but respited and banished to Ceylon in English custody ; Lord Wolseley's expedition up the Nile for the relief of Khartoum, and the death of Gordon in 1885, which went straight to the heart of every Englishman ; the advance of Russia on the Afghan frontier in 1885 and the movement of a British force on Candahar ; the occupation of Burmah by Great Britain in 1886 and the process of conquering that country in detail, a work not yet complete ; the fall of the Empire of Brazil and the institution of a republic in its stead in 1889 ; the Convention of 1887 for securing the neutrality of the Suez Canal ; and the Pan-American Congress of 1889, consisting of representatives from the principal States of North and South America, which may be looked upon both as a recognition of the Monroe Doctrine and of the Primacy of the United States. 1890 saw the retirement of Prince Bismarck, after a long and energetic career ; while in the same year a protectorate was extended over Zanzibar by Great Britain, and agreements entered into by the latter country with Germany, France, and Portugal for the better opening up of the continent of Africa ; also Heligoland was ceded to Germany. The struggle in Chili, ending in the victory of the Congressional party, the cruel persecution of the Jews in Russia, and the terrible famine in that country are among the occurrences of 1891.

Questions
agitated

§ 38. Among the important questions of this period may be mentioned the interference of Sardinia with the Papal Government, depriving the late Pope Pius IX. of his temporal

power on September 20, 1870; the 'Alabama' controversy, and the three rules of neutrality of the Treaty of Washington, 1871, followed by a reference to the claims in dispute between Great Britain and the United States to an international tribunal of arbitration; the 'Trent' affair, resulting in the right of the inviolability of diplomatic agents and envoys, when in a neutral ship and bound from one neutral port to another, being definitively established; the Conference of London, 1871, which abrogated the neutralisation of the Black Sea, but declared it to be an essential principle of international law, that no nation can liberate herself from or modify the stipulations of a treaty, without the consent of the other contracting parties; the establishment of 'International Courts' in Egypt and their jurisdiction over the public property of that country; the treaties with China and Japan, by virtue of which Great Britain, in 1865, established a Supreme Court of Justice at Shanghai, with provincial courts in China and Japan; the acquisition of the Khedive's interests in the Suez Canal by Great Britain in 1875 for the sum of four millions; the controversy as to the extra-territorial position of ships of war with reference to fugitive slaves, and the case of the 'Huascar' in 1877, raising a question as to piracy.

The Convention of Geneva, 1864, for the amelioration of the condition of the sick and wounded in time of war; the additional articles to the same Convention agreed on in 1868, but not yet adopted; the Declaration of St. Petersburg, 1868, limiting the use of explosive bullets to certain conditions; the Brussels Conference, 1874, resulting in a project for an international declaration concerning the laws and customs of war, which, however, the British Government considered inexpedient, and which has not at the present time been adopted by any Power; the Foreign Enlistment Act, passed by the Parliament of Great Britain in 1870, for the purpose of more carefully regulating the conduct of British subjects during the existence of hostilities between foreign States with which Great Britain may be at peace; the Territorial Waters Jurisdiction Act of 1878, by which any indictable offence committed by a person, whether he be a subject of her Majesty or not, on the open sea within one marine league of the coast may be dealt with and punished by British Courts. The 'Scramble for Africa' of 1884, and the competition of rival

explorers led to the appointment of an International Commission to regulate the navigation and commerce of the Congo, while the public opinion of Europe was, four years later, moved by the crusade of Cardinal De Lavigerie to cause the principal European Powers to agree to a convention, for the purpose of preventing the export of slaves from Eastern Africa. The refusal of France, in 1880, to allow the extradition to Russia of Hartmann, a principal in a plot against the Czar, as being a political offender; the occupation of part of Madagascar by French naval forces in 1883 to re-establish alleged 'French rights' in that island; the decision of the Queen's Bench Division in the 'Mignonette' case in 1884, that the old law of the sea permitting cannibalism in extremest necessity is wrong; the collapse of the Panama Canal Company in 1889, followed soon afterwards by the difficulties of the French Comptoir d'Escompte; while the English administration of Egypt has produced excellent results in that country, made plain by the vast improvement in its financial situation.

In 1883 Germany, by the repeal of the Falk Laws, resumed friendly relations with the Vatican. In 1885 the arbitration of the Pope was sought by Germany and Spain on the subject of the Caroline Islands; and in 1886 the pretensions of France to a protectorate of the Roman Catholics in China, led to direct negotiations being established, to the exclusion of France, between the Peking Government and the Vatican; while in 1888 Great Britain joyfully solemnised the tercentenary of the defeat of the Spanish Armada. A new system of commercial treaties, framed on the basis of equivalent tariff reductions, was concluded in 1891 between Germany, Austria, Italy, Belgium, and Switzerland approximating to a Zollverein for Central Europe.

Writings
of
publicists

§ 39. Among the principal writers on International Law during this epoch, the names of some of those who are already recorded in the last period should be reckoned. To these must be added Dr. John Gaspard Bluntschli (born 1808, died 1881), who wrote his 'Das moderne Völkerrecht als Rechtsbuch mit Erläuterungen,' or Codified International Law, in 1868; and subsequent editions in 1872 and 1878; and his 'Das Beuterecht im Krieg und das Seebeuterecht insbesondere,' or 'The Right of Booty in War, and the

Right of Prize in particular,' in 1878. Sir Edward Creasy, Chief Justice of Ceylon, and Emeritus Professor of History in University College, London, who published his 'First Platform of International Law' in 1876. He died in 1878. Richard Henry Dana, junr., born at Cambridge, Massachusetts, in 1815, published in 1866 a new edition of Wheaton's 'Elements of International Law,' this being the eighth edition of that valuable work. He also published the 'Seaman's Manual,' a dictionary of sea-terms. He died in 1882. Francis Wharton, born at Philadelphia in 1820, died in 1889, published his valuable 'Treatise on the Conflict of Laws, or Private International Law,' in 1872, and a 'Digest of International Law,' in 1886, by desire of the United States Government. Charles Calvo, born in the Argentine Republic in 1824, published his 'Derecho Internacional teórico y práctico de Europa y America' in 1868, and another edition of the same work in 1870-72, as well as a translation into Spanish of Wheaton's 'History of the Law of Nations' in 1861, and a 'Complete Historical Collection of Treaties, &c., of all the States of Latin America from the year 1493 to the present day,' in 1862-1869.

F. de Martens, Professor of International Law at the Imperial University of St. Petersburg, published, in Russian, 'The Rights of Private Property during War,' in 1869; 'The Problems of modern International Law,' in 1871; 'The Consulates and Consular Jurisdiction in the East,' in 1873, and 'A Collection of the Treaties and Conventions concluded by Russia with Foreign Powers,' in 1874-78. This last work is both in Russian and in French. Pradier Fodéré, of Strassburg, wrote a 'New Public International Law' in 1868, and a 'Private International Law' in 1875. Fiore Pascal, of Turin, published his 'Diritto Pubblico Internazionale' in 1865, and his 'Diritto Internazionale Privato' in 1874. De Bar published his 'Das International-Privat- und Strafrecht' at Hanover in 1862. Sir Travers Twiss published 'The Rights and Duties of Nations in Time of Peace,' in 1861; 'The Rights and Duties of Nations in Time of War,' in 1863, and French translations of the same in 1887-89; he also edited the famous 'Blackbook of the Admiralty' in 1871-76. Ercole Vidari, of Pavia, published 'Del Rispetto della Proprietà fra gli Stati in Guerra' in 1867. The Right Honourable Mount-

ague Bernard, M.A., Chichele Professor of International Law and Diplomacy in the University of Oxford, published in 1870 his 'Historical Account of the Neutrality of Great Britain during the American War.' Eugène Cauchy published at Paris, in 1862, 'Le Droit Maritime International,' and 'Respect de la Propriété privée dans la Guerre maritime' in 1866. Louis Gessner, of Dresden, published the 'Droit des Neutres sur Mer' in 1865, and 'Zur Reform des Kriegssee-recht' in 1875. Pascal Stanislaus Mancini, of Rome, published his 'Droit International Public' in 1871. Peter Esperson, of Pavia, published 'Dei Rapporti giuridici tra i Belligeranti e i Neutrali' in 1865; 'La Questione dell' "Alabama"' in 1869; 'Diritto Cambiario Internazionale' in 1870, and 'Diritto diplomatico e Giurisdizione internazionale marittima' in 1872-77. Ægidi and Klauholds wrote their joint work, 'Freie Schiffe unter Feindes Flagge,' or 'Free Ships under an Enemy's Flag,' in 1867. H. Marquardsen, of Erlangen, published 'Der "Trent"-Fall zur Lehre von der Kriegscontrabande und dem Transport der Neutralen,' or 'The "Trent" Case as regards Contrabands of War and Transport by Neutrals,' in 1862. Sir W. Vernon Harcourt, born in 1827, author of 'The Letters of Historicus on some Questions of International Law,' first published in 'The Times' newspaper, but afterwards reprinted with considerable additions in 1863. Thomas Erskine Holland, of the University of Oxford, edited Albericus Gentilis in 1877, and published his 'Elements of Jurisprudence' in 1880. David Dudley Field, of New York (born in 1805), published, in 1873, his 'Draft Outlines of an International Code.' This work was translated into Italian by Professor Pierantoni, of Rome, in 1874. Charles J. M. Lucas, of Saint Briec, in France, published several papers on 'The Civilisation of Warfare,' 1872-1878. Without being able to share in the belief of those who aspire for a perpetual peace, he seeks to render war less barbarous by means of a gradual codification of International Law. Charles A. Brocher, of Geneva (born in 1811), published a 'New Treatise on Private International Law' in 1876, and Louis Renault wrote his 'Introduction à l'Étude du Droit International' in 1878. James Lorimer, of Edinburgh, published his 'Institutes of the Law of Nations' in 1884. Gustave Moynier published his 'Étude sur la Convention de Genève' in 1870,

and is the author of several works bearing on the law of nations. Rolin-Jacquemyns, of Ghent, founder and editor for many years of the '*Revue de Droit International et de la Législation comparée*,' late Minister of the Interior for Belgium, has published many works on International Law, among others '*La Guerre actuelle*,' in 1870, and '*De la Neutralité de la Grande-Bretagne pendant la Guerre civile américaine*.' Besides these writers, names must be recorded from all parts of the civilised world of men who have contributed towards the great science of International Law, viz. :—from Belgium : Arntz, Laurent, Laveleye, Nys, and Alberic Rolin ; from France : Clunet, Dubois, Massé, De Montluc, Renault, Léon-Caen ; from Germany : Goldschmidt, Holtzendorff, Perels ; from Greece : Saripolos ; from Great Britain : Dicey, Alderson-Foote, Pitt-Cobbett ; from Holland : Asser, Den Beer-Poortugael, Ferguson ; from Italy : Brusa, Norsa, Pierantoni ; from Russia : Kamarowsky, Kapoustine, Kasperek ; from Scandinavia : Aubert, Goos, Olivecrona ; from Spain : Labra, Landa ; from Switzerland : Hornung, Koenig, Rivier ; and from the United States : W. A. P. Martin, Minister at Peking, who has actually translated into Chinese the International Law works of Wheaton, Martens, Woolsey, and Bluntschli.

In 1879, the Lords Commissioners of the Admiralty of the United Kingdom caused the existing Regulations and Instructions for the government of Her Majesty's Naval Service to be thoroughly amended and revised. This important work was executed, in a most efficient manner, by the late Mr. Frederick James Fegen, R.N., C.B., barrister-at-law, and forms a Naval Code of great value.

CHAPTER II

NATURE AND SOURCES OF INTERNATIONAL LAW

1. Definition of International Law—2. Division into natural law and positive law—3. What is meant by natural law—4. Its application to independent States—5. The positive law of nations—6. Relation between the natural and positive law of nations—7. The conventional law of nations—8. The customary law of nations—9. Customs, how far binding—10. Division of the positive law of nations by Wolfius and Vattel—11. Objections to those divisions—12. Distinction between absolute rights, rights of comity, and private rights—13. There is no universal law of nations—14. How far its rules are obligatory—15. Violations of its rules, how punished—16. Can sovereign States be punished?—17. General sources of international law—18. Justice as a source and test—19. Authorities on this point—20. History as a source—21. The Roman civil law—22. Decision of courts of prize—23. Adjudications of mixed tribunals—24. Ordinances and commercial laws of particular States—25. Decisions of local courts—26. Text-writers of approved authority—27. Reason of the authority of text-writers—28. Treaties and international compacts—29. Effect of treaties on the interpretation of terms—30. State papers and diplomatic correspondence.

Definition
of inter-
national
law

§ I. INTERNATIONAL law, or The law of nations,—or, as Zouch has it, *jus inter gentes*—may be defined to be, *The rules of conduct regulating the intercourse of States.*¹

• Most writers have endeavoured to frame their definition so as to embrace the sources of this law, rather than to describe the nature and character of the law itself. Thus, Grotius considers the law of nations as a positive institution, deriving its authority from the positive consent of all or the greater

¹ Zouch, who lived in the middle of the seventeenth century, was the first to adopt the term *jus inter gentes* in the place of *jus gentium*; he also divided the law of nations into natural, conventional, and customary law. He is closely followed by Story, who says, 'By the law of nations we understand, not merely that portion of public law which is generally recognised amongst nations (as seems to have been the prevailing use of the phrase in the Roman code), but that portion of the public law which regulates the intercourse, adjusts the rights, and forms the basis of the commercial and political relations of States with each other. Perhaps the most appropriate name would be "international law," *jus inter gentes*.'—*Miscell. Writings*, 536, 'On the Value of Legal Studies.'

part of civilised nations, united in a social compact for this purpose; while Rutherford denies the existence of any such social union among nations, and concludes that what is called the law of nations, when applied to States, is nothing more than what is called natural law when applied to individuals as parts of these collective bodies. Hobbes and Puffendorf also consider the general principles of natural law, and the law of nations, as one and the same thing, and the distinction between them as merely verbal; while others define this law to consist only of the usages, customs, and conventions adopted and observed among nations. The definition here given avoids any reference to those questions which have been so much discussed by publicists, and upon which there is very little prospect of a general agreement.¹

§ 2. The rules which ought to regulate the conduct of nations in their mutual intercourse are undoubtedly deduced, in part, from reason and justice, and from the nature of society existing between independent States or bodies politic; and, in part, from usage, and the agreements or compacts entered into between different nations. This difference in the nature and origin of these rules has led text-writers to divide international law into different branches. The most common of these general divisions is, into the natural law of nations, and the positive law of nations. The first of these branches has been subdivided into the Divine law, and the application of the law of God to States. The second branch has also been subdivided into the conventional law of nations, and the customary law of nations. These divisions are somewhat arbitrary, and we shall follow them only so far as may be necessary or convenient, in pointing out the sources of international jurisprudence, and in discussing

¹ Vattel, *Droit des Gens*, Prélim., § 3; Wheaton, *Elem. Int. Law*, pt. i. ch. i. § 11; Bentham, *Morals and Leg.*, vol. ii. p. 256; Foelix, *Droit Int.*, Tit. prélim., ch. i. § 1; Polson, *Law of Nations*, p. 1; Manning, *Law of Nations*, pp. 2, 57-58; Hautefeuille, *Des Nations Neutres*, tom. i. p. 3; D'Aguesseau, *Œuvres*, tom. i. p. 337; Savigny, *Röm. Rechts*, b. i. k. ii. § 11; Wildman, *Int. Law*, vol. i. p. 1; Bowyer, *Un. Pub. Law*, ch. ii.; Massé, *Droit Int.*, § 1; Bello, *Derecho Int.*, Noc. prel. § 1; Riquelme, *Derecho Pub. Int.*, lib. i. tit. i. § 1; Phillimore, *Int. Law*, vol. i. § 9; Ompteda, *Literatur des Völkerrechts*, § 64; Rayneval, *Droit de la Nat.*, &c. liv. i. ch. i. § 10; Ortolan, *Dip. de la Mer*, liv. i. ch. iv.; Garden, *De la Diplomatie*, tom. i. p. 36; Martens, *Précis du Droit des Gens*, § 2; Réal, *Science du Gouvernement*, tom. i. p. 22; Zouch, *Juris et Jud. fecial., sive juris inter gentes, et quæst. de eodem explicatio*.

the nature and character of the rules which constitute that code.¹

Divine or
natural
law

§ 3. By the Divine law, we understand the rules of conduct prescribed by God to His rational creatures, and revealed by the light of reason, or the Sacred Scriptures. 'Natural law,' says Grotius, 'is the dictate of right reason, pronouncing that there is in some actions a moral obligation, and in other actions a moral deformity, arising from their respective suitability or repugnance to the rational and social nature, and that, consequently, such actions are either forbidden or enjoined by God, the Author of nature. Actions which are the subject of this exertion of reason are in themselves lawful or unlawful, and are, therefore, as such, necessarily commanded or prohibited by God.' In other words, there is a law of conscience, enjoining some actions and prohibiting others, according to their respective suitability or repugnance to the law of reason and the Sacred Scriptures. Ethical writers distinguish between the principles of eternal justice, implanted by God in all His moral and social creatures, and the revealed will of God enforcing and extending these principles. But the examination and discussion of these distinctions belong to ethical science rather than international jurisprudence.²

Its appli-
cation to
States

§ 4. But as this Divine law, which God has prescribed to His rational creatures, whether revealed by the light of reason or the Sacred Scriptures, was evidently intended for the rules of conduct of individuals living together in a social state, it necessarily requires explanations and modifications when applied to the conduct of independent communities. Hence the law of nations has been distinguished from the natural or Divine law, the former including the rules for the application of natural law to independent States, which rules have been established by the great body of these communities for the promotion of their general utility, rather than that of a particular State. This view is opposed by Hobbes and Puffendorf, who consider the precepts to be the same, whether applied to individuals or States, and that the same law 'which, when speaking of individual men, we call the law of

¹ Heffter, *Droit International*, § 2; Pinheiro-Ferreira, *Notes sur Vattel*, tom. iii. p. 22; Wolfius, *Jus Gentium*, Proleg. § 3.

² Grotius, *De Jure Belli*, lib. i. cap. i. § 10.

nature, is called the law of nations when applied to whole States, nations, or people.' The distinction drawn by Grotius is, perhaps, not very obvious, and is of little or no practical importance.¹

§ 5. Nor, indeed, is the definition of either Grotius or his opponents at all satisfactory ; for international law, as understood in the present age, is something more and other than natural or Divine law, applied to the conduct of independent States, considered as moral beings ; and in order to determine what is the rule to be observed among nations in any particular case, it is not sufficient to inquire what would be the natural law in a similar case, when applied to individual persons. 'The application of a rule,' says Vattel, 'cannot be reasonable and just, unless it is made in a manner suitable to the subject. We are not to imagine that the law of nations is precisely, and in every case, the same as the law of nature, with the difference only in the subjects to which it is applied, so as to allow of our substituting nations for individuals. A State or civil society is a subject very different from an individual of the human race ; from which circumstance, pursuant to the law of nature itself, there result, in many cases, very different obligations and rights ; since the same general rule, applied to two subjects, cannot produce exactly the same decisions when the subjects are different ; and a particular rule which is perfectly just with respect to one subject, is not applicable to another subject of quite a different nature. There are many cases, then, in which the law of nature does not decide between State and State in the same manner as it would between man and man. We must, therefore, know how to accommodate the application of it to different subjects ; and it is the art of applying it with a justness, founded on right and reason, that renders the law of nations a distinct science.'

The posi-
tive law
of nations

Again, as individuals adopt positive human institutions for their government, so States are capable of contracting obligations toward others, either by their general acquiescence in certain positive rules for the regulation of their mutual intercourse, by that tacit convention implied from

¹ Puffendorf, *De Jure Nat. et Gent.*, lib. ii. cap. iii. § 23 ; Hobbes, *De Cive*, cap. xiv. § 4 ; Leibnitz, *De Usu Act. Pub.*, § 13 ; Cumberland, *De Legibus Naturalibus*, cap. v. § 1.

usage and practice, or by direct and positive compact or agreement. These, where not contrary to the law of nature, are binding rules of conduct, and must be inquired into before we can determine what is the rule to be observed by such States in any particular case. Hence arises that important branch called *the positive law of nations*, which has been subdivided into the *conventional* law of nations and the *customary* laws of nations.¹

Relations
between
the
natural
and posi-
tive law

§ 6. The relation between the two great branches of international law—the natural and the positive law of nations—is thus stated by a recent writer on this subject. ‘The necessity,’ says Phillimore, ‘of mutual intercourse is laid in the nature of States, as it is of individuals, by God, who willed the State and created the individual. The intercourse of nations, therefore, gives rise to international rights and duties, and these require an international law for their regulation and enforcement. That law is not enacted by the will of any common superior upon earth, but it is enacted by the will of God ; and it is expressed in the consent, tacit or declared, of independent nations. The law which governs the external affairs, equally with that which governs the internal affairs, of States receives accessions from custom and usage, binding the subjects of them as to things which, previous to the introduction of such custom and usage, might have been in their nature indifferent. Custom and usage, moreover, outwardly express the consent of nations to things which are *naturally*, that is, by the law of God, binding upon them. But it is to be remembered that, in this latter case, usage is the effect and not the cause of the law.’²

Conven-
tional law

§ 7. *The conventional law of nations* results from the stipulations of treaties, and consists of the rules of conduct agreed upon by the contracting parties. As such agreement binds only the contracting parties, it is evident that the conventional law of nations is not a universal, but a particular

¹ Vattel, *Droit des Gens*, Prélim., § 6 ; the ‘Flad Oyen,’ 1 *Rob.*, 140 ; Manning, *Law of Nations*, p. 67 ; Massé, *Droit Commercial*, liv. i. tit. ii. ch. i. ; Martens, *Précis du Droit des Gens*, §§ 5 et seq. ; Heffter, *Droit International*, §§ 1-4 ; Ortolan, *Diplomatie de la Mer*, liv. i. ch. iv.

² Phillimore, *International Law*, vol. i., Preface ; Bynkershoek, *Quæst. Jur. Pub.*, lib. i. cap. x. ; Bynkershoek, *De Foro Legatorum*, cap. iii. § 10, cap. vii. § 8 ; Rutherforth, *Institutes*, vol. i. ch. iii. §§ 1-6 ; Bowyer, *Universal Public Law*, ch. iv. ; Cotellet, *Droit des Gens*, pt. i. et seq.

law. Nevertheless, as these agreements are not always limited to the intercourse of the contracting parties with each other, but extend to their intercourse with other nations, and are, moreover, frequently intended to express opinions or to establish rules of action, with respect to particular points or questions in the law of nations, they belong to history, and have an important influence in regulating the general intercourse of States, and in modifying and determining the principles of international law. Hence the stipulations of treaties between highly civilised nations form an important branch of the general law of nations.

§ 8. *The customary law of nations* is founded on the tacit Cus-
tomary
law or implied consent of nations as deduced from their intercourse with each other; in order to determine whether any particular act is sanctioned or forbidden by this law, we must inquire whether it has been approved or disapproved by civilised nations generally, or at least by the particular nations which are affected in any way by the act.¹

§ 9. Customs which are lawful and innocent are binding Customs,
how far
binding upon the States which have adopted them; but those which are unjust and illegal, and in violation of natural and Divine law, have no binding force. 'When a custom is generally established,' says Vattel, 'either between all the civilised nations of the world, or only between those of a certain continent, as of Europe, for example, or between those which have most frequent intercourse with each other; if that custom is in its own nature indifferent, and much more if it be useful and reasonable, it becomes obligatory on all the nations in question, which are considered as having given their consent to it, and are bound to observe it toward each other, *as long as they have not expressly declared* their resolution of not observing it in future. But if that custom contains anything unlawful or unjust, it is not obligatory; on the contrary, every nation is bound to relinquish it, since nothing can oblige or authorise a violation of the law of nature.'

The foregoing remark of Vattel, that the customary law of nations may be varied or abandoned at pleasure, such variation or abandonment being previously notified, must be limited to the peculiar customs of particular States in their intercourse

¹ The 'Herstelder,' 1 Rob., 115.

with other nations, and cannot be applied to general law, or what he calls the voluntary law of nations, which is founded on general usage or implied consent, as described in the next paragraph.¹

Division
by Vattel

§ 10. Wolfius, and his abridger, Vattel, distinguish between particular and general usages, and confine the term *customary* to the former, and introduce a third division of the positive law of nations, which they call *the voluntary law of nations*, to designate that universal voluntary law of usage, or of custom, which has been established and sanctioned by the frequency of its recognition and the numbers who have approved it. From this subdivision they would exclude all usages, which are confined to particular periods, or to particular nations and countries.²

Objections
to this

§ 11. This division of the positive law of nations, by Vattel, into voluntary, conventional, and customary laws, has been objected to by some as improper, and calculated to confuse rather than to elucidate the subject. It was adopted by Wheaton in the first edition of his 'Elements of International Law,' but afterward rejected by him on the ground that the term 'voluntary law of nations' more properly designated the *genus*, including all the rules introduced by positive consent, for the regulation of international conduct, and should be divided into two *species*—conventional law and customary law—the former being introduced by treaty, and the latter by usage; the former by express consent, and the latter by tacit consent between nations. Notwithstanding this objection, we think the divisions of Vattel not entirely without foundation, and, at least, as worthy of consideration. His terms, however, are not well chosen.³

Other
divisions

§ 12. Other publicists have made still further and different divisions, and subdivisions, of this branch of international jurisprudence. Of these we shall mention but one, which not only seems to be well founded, but to point out distinctions which it is important to observe. The custom and usage of nations have established certain rights which are called *absolute*, or

¹ Vattel, *Droit des Gens*, Prélim., § 26; Fennings v. Lord Granville, 1 Taunt. R., 246.

² Vattel, *Droit des Gens*, Prélim., §§ 25-27; Wolfius, *Jus Gentium*, Proleg., § 25; Chitty, *Com. Law*, pp. 28, 29.

³ Pinheiro-Ferreira, *Notes sur Vattel*, tom. iii. p. 22; Wheaton, *Elem. Int. Law*, pt. i. ch. i. § 9, first edition, § 13.

rights *stricti juris*, while, at the same time, increasing civilisation has, in other respects, mitigated the severity of these rights by the *usage of comity—comitas gentium*—by which is understood the rule of convenience, as distinguished from abstract right.

Again, with regard to the intercourse of *individual* members of different States, with regard to their commerce, contracts, sales, marriages, nuptial settlements, wills, and successions, it is necessary that some common principles should be adopted to prevent utter confusion of all rights and remedies. The jurisprudence which arises from the conflict of laws of different nations with respect to the above, is a branch of public law, and is commonly—but erroneously—termed *private international law*, to distinguish it from other branches of *international law*. It consists of rules having reference, not to the relations of States among themselves, but to the private relations of individuals of one State with the laws and institutions of other States.¹

§ 13. It is admitted by all, that there is no universal or immutable law of nations, binding upon the whole human race, which all mankind in all ages and countries have recognised and obeyed. Nevertheless, there are certain principles of action, a certain distinction between right and wrong,—between justice and injustice,—a certain Divine or natural law,—or rule of right reason, which, in the words of Cicero, ‘is congenial to the feelings of nature, diffused among all men, uniform, eternal, commanding us to our duty, and prohibiting every violation of it,—one eternal and immortal law, which can neither be repealed nor derogated from, addressing itself to all nations and all ages, deriving its authority from the common Sovereign of the universe, seeking no other law-giver and interpreter, carrying home its sanctions to every breast, by the inevitable punishment He inflicts on its transgressors.’

It is to these principles, or rule of right reason, or natural law, that all other laws, whether founded on custom or treaty, must be referred, and their binding force determined. If in

¹ Phillimore, *Int. Law*, vol. i. §§ 140, 141; Foelix, *Droit Int. Privé*, Tit. prélim. chs. i., iii.; the ‘*Maria*,’ 1 *Rob.*, 367; Cushing, *Opin. of U. S. Attys. - Gen.*, vol. vii. p. 18; Westlake, *Private Int. Law*, ch. i. § 1; Heffter, *Droit International*, § 2; Story, *Conflict of Laws*, ch. i. § 4.

accordance with the spirit of this natural law, or if innocent in themselves, they are binding upon all who have adopted them ; but if they are in violation of this law, and are unjust in their nature and effects, they are without force. The principles of natural justice, applied to the conduct of States, considered as moral beings, must therefore constitute the foundation upon which the customs, usages, and conventions of civilised and Christian nations are erected into a grand and lofty temple. The character and durability of the structure must depend upon the skill of the architect, and the nature of the materials ; but the foundation is as broad as the principles of justice, and as immutable as the law of God.

Its rules
obligatory

§ 14. It must not be inferred that, because there is no immutable law of nations absolutely binding upon all mankind, that the rules of international intercourse, established by general consent and sanctioned by reason, are not obligatory upon States, and may be violated with impunity. These rules cannot, perhaps, with strict propriety be called *laws*, in the sense of commands proceeding from an authority competent in all cases to enforce obedience or punish violations. But, like the *laws of honour*, they are rules of conduct imposed by public opinion, and are enforced by appropriate sanctions. They are, therefore, by their analogy to positive commands properly termed *laws* ; and they are enforced, not only by moral sanctions, but by the fear of provoking general hostility, and incurring its evils, in case of violating maxims which are generally received and respected among nations.¹

Violations,
how
punished

§ 15. Moreover, the law of nations provides, in a measure, for the enforcement of its rules, and the punishment of a violation of its maxims. Certain offences against this law—as piracy, for example—wheresoever and by whomsoever committed, are within the cognisance of the judicial power of every State ; for, being regarded as the common enemies of all mankind, any one may lawfully capture pirates upon the high seas, and the tribunals of any State, within whose territorial jurisdiction they may be brought, can try and punish them for their crimes. And in case of smaller offences, where the accused must be sent to the tribunals of his own country for

¹ Wildman, *International Law*, vol. i. p. 32 ; Bentham, *Morals and Legislation*, vol. ii. p. 256 ; Austin, *Province of Jurisprudence*, pp. 147, 207 ; Sedgwick, *On Statut. and Constitut. Law*, pp. 222–223.

trial, or where other States can exercise no jurisdiction whatever, the moral obligation of a State to punish its subjects, for offences against international law, is so strong that no one can habitually neglect to do so with impunity. A State which should openly violate, or permits its subjects to violate, the well-established and generally received maxims of this law would not only lose its standing among nations, but would provoke universal reprobation and hostility.

§ 16. Publicists have discussed the question whether States are liable to *punishment* for offences against international law. While all admit that these bodies politic are capable of rights and liable to obligations, some contend that they can never be subjects of *criminal law*, and, therefore, that no punishment can be inflicted on them for offences committed. It is probably true that States cannot be *punished*, in the strict technical sense of that term. Nevertheless, if one State be injured or insulted by another, it may seek redress by war, and require not only indemnity for the past, but security for the future ; and, in order to attain this object, it may destroy the property of the offending State and take away its territory. These acts are not, in the strict sense of that term, acts of punishment, but, directly or indirectly, acts of self-defence ; and the State which resorts to such measures against another can justify its conduct only on the ground of their being necessary, for the preservation of its own rights, the welfare of other States, or the peace of the world. They are not defensible as punishments due and inflicted upon the offender, for one State has no authority to punish the offences of another. Nevertheless, they are, with respect to the offending State, to all intents and purposes *punishments*.¹

§ 17. In the present imperfect state of international law, which recognises the obligatory force of no written code, and acknowledges no permanent judicial expositor of its principles, we must necessarily resort to the precedents collected from history, the opinions of jurisconsults, and the decisions of tribunals, in order to ascertain what these principles are, and to determine what are the proper rules for their application. Some of these principles and rules have been settled for ages, and have the force of positive laws which no one will now

¹ Phillimore, *Int. Law*, vol. i. § 11 ; Pinheiro-Ferreira, *Com. sur Vattel*, verb 'punir ;' Savigny, *System des Röm. Rechts*, b. ii. pp. 94-96.

venture to dispute or call into question ; while others are admitted only by particular States, and cannot be regarded as binding upon any one which has not adopted them. The sources of international law are, therefore, as various as the subjects to which its rules are applied ; and, in deducing these rules, we should distinguish between those which are applicable only to particular States and those which are obligatory upon all. We will now proceed to point out some of these sources, and to discuss their character and authority.

The
Divine
law

§ 18. The first source from which are deduced the rules of conduct which ought to be observed between nations, is the *Divine law*, or principle of justice, which has been defined as ‘a constant and perpetual disposition to render every man his due.’ The peculiar nature of the society existing among independent States, renders it more difficult to apply this principle to them than to individual members of the same State ; and there is, therefore, less uniformity of opinion with respect to the rules of international law properly deducible from it, than with respect to the rules of moral law governing the intercourse of individual men. It is, perhaps, more properly speaking, the test by which the rules of positive international law are to be judged, rather than the source from which these rules themselves are deduced.¹

Rather
a test

§ 19. Grotius lays down the broad principle that the positive law of nations may *add* to, but cannot *subtract* from, the law of nature. ‘Nimirum humana jura multa constituere possunt *præter* naturam, *contra* nihil.’ Voet, Suarez, and Wolfius express themselves to the same effect. Burke says : ‘All human laws are, properly speaking, only declaratory. They may alter the mode and application, but have no power over the substance of *original justice*.’ Mackintosh says : ‘The duties of men, of subjects, of princes, of lawgivers, of magistrates, and of *States*, are all parts of one consistent system of universal morality. Between the most abstract and elementary maxim of moral philosophy, and the most complicated controversies of civil or public law, there subsists a connection. *The principle of justice*, deeply rooted in the nature and interest of man, pervades the whole system, and is discoverable in every part of it, even to its minutest ramification in a legal formality, or in the construction of an article in a treaty.’

¹ Justinian, *Institutes*, lib. i. tit. i.

Vattel considers '*justice* as the basis of all society ;' and that, although natural law cannot decide between nation and nation, as it would between individual and individual, yet the rules of international law must be according to *justice*, founded on *right reason*.¹

§ 20. The *history* of transactions relating to the intercourse of States, both in peace and war, is one of the most faithful sources of international law. What is called the voluntary, or positive law of nations, is mainly derived from usage and custom, and to determine these we must have recourse to the history of what has passed from time to time among the several nations of the world ; not that history will afford us the record of any constant and uninterrupted practice, but because we shall there find what has been generally approved, and what has been generally condemned in the variable and contradictory practice of nations ; 'for,' in the words of Grotius, 'such a universal approbation must arise from some universal principle, and this universal principle can be nothing else but the common sense or reason of mankind.'²

History as
a source

§ 21. It will generally be found that the deficiencies of precedent, usage, and express international authority may be supplied from the rich treasury of the *Roman Civil Law*. Indeed, the greater number of controversies between States would find a just solution in this comprehensive system of practical equity, which furnishes principles of universal jurisprudence, applicable alike to individuals and to States. 'Although,' says Wiseman, 'the civil law was not intended by the Roman legislators to reach or direct beyond the bounds of the Roman empire . . . yet, since there is a strong stream of natural reason continually flowing in the channel of the Roman laws, and that there is no affair or business known to any part of the world now, which the Roman empire dealt not in before, and their justice still provided for, what should hinder but, the nature of affairs being the same, the same general rules of justice and dictates of reason may be as fitly accommodated to foreigners, dealing with one another (as it is clear that they have been by the civilians of all ages), as to those of

The
Roman
civil law

¹ Grotius, *De Jure Belli*, lib. ii. cap. vi. § 6 ; Voet, *Comm. ad Pand.*, lib. i. § 19 ; Suarez, *De Legibus*, &c., lib. ii. cap. xx. § 3 ; Wolfius, *Jus Gentium*, § 163 ; Vattel, *Droit des Gens*, liv. ii. chap. v. § 63 ; Mackintosh, *Miscellaneous Works*, p. 183.

² Grotius, *De Jure Belli*, lib. i. cap. i. § 12.

one and the same nation, when one common reason is a guide and a light to them both? for it is not the persons, but the case, and the reasons therein, that are considerable altogether.' Under the general title of the Roman Civil Law is comprised the entire system of law which, after passing through the various stages represented by the Law of the Twelve Tables, the *Quæstiones*, the *Legis Actiones*, the *Formulae*, &c., and undergoing a constant silent process of modification through the action of the Prætor, took shape as a Code in the Western empire under Theodosius II., A.D. 439. The Theodosian code, which is divided into sixteen books, was the primary, perhaps the only, source of the purely Roman portion of the *Leges Romanæ Barbarorum*, and in that shape probably continued to be in force as law during a considerable portion of the Middle Ages.¹

Decisions
of prize
courts

§ 22. According to the present law and practice of nations, the seat of judicial authority of *prize-courts* is located in the belligerent country, and they are dependent, in a measure, upon the laws and institutions of the particular States by which they are established. In this respect they are *ex parte* tribunals. But the subjects of their adjudication are, without distinction, matters relating to the citizens and property of their own States, of neutrals, and of the belligerent country; and the law itself, by which their decisions should be governed, has no locality, and it is the duty of such a court to determine questions which come before it exactly as it would determine them by sitting in the neutral or belligerent country, the rights of whose citizens are to be adjudicated upon. In theory, therefore, such courts are regarded as international tribunals.² But the practice has not at all times cor-

¹ Wiseman, *Excellency of the Civil Law*, p. 110; Burke, *Works*, vol. ii., 'Letters on a Regicide Peace'; the 'Maria,' 1 *Rob.*, 363. In a recent (1874) Canadian case on appeal, the Privy Council appear to have held that the Roman law in force in the province of Lower Canada, as brought there from France, is the law of the Theodosian code, and that this code, and therefore the law of the Antonines, ought to prevail over that of Justinian in countries governed by the code of Paris (*Evanturel v. Evanturel*, *L.R.* 6, P.C. 1). But see doubts suggested as to the continued force of the Theodosian code, in *The Law Magazine and Review* for May, 1881, in a review of *Piggott's Foreign Judgments*.

² The sentence of a foreign court of Admiralty decreeing a ship to be lawful prize was held to be conclusive by the English court of Admiralty in 1679.—*Hughes v. Cornelius*, 2 *Show. R.*, 232; and see the American law to the same effect in 5 *Cranch*, 335; and 3 *Conn. R.*, 171.

responded with this theory, and, on this account, it is necessary to rigidly investigate the principles upon which these adjudications are founded, and the reasonings by which they are supported. With this caution in their use, the books of Admiralty reports may become an instructive source of information respecting the practical rules of international law. It is also necessary to continually bear in mind the distinction between cases decided upon local law and institutions, and those decided upon general principles which should govern the intercourse of independent States. Moreover, in maritime States, a court will feel, though perhaps unconsciously, the influence of a national bias in favour of the captor.¹

§ 23. Greater weight is justly attributable to the judgments of *mixed tribunals*, appointed by the joint consent of the several States between which they are to decide, than to those of Admiralty courts established by, and dependent in some measure on, the instructions of a single State; provided that the judges and umpires of these mixed tribunals possess the same character, ability, and learning as the judges of Admiralty. But, unfortunately, this has not generally been the case; and the decisions of these boards of arbitration have too often been mere compromises of differences, such as in the case of the Alabama arbitration in 1872, rather than the elucidation of principles of international law, founded upon the true basis of international justice and supported by right reason. Nevertheless, these adjudications furnish a fruitful source of international law, and may always be consulted with profit and instruction.²

Judgments
of mixed
tribunals

§ 24. *The ordinances and commercial laws* of particular States, and the rules prescribed for the conduct of their commissioned cruisers and prize tribunals, may also be referred to for illustrations of the voluntary law of nations, as understood and practised by such States. They should, however, be investigated with caution, and are received only as particular admissions of general principles. Nevertheless, some of the most important modifications and improvements in the modern law of nations have thus originated in the ordinances

Ordinances
and commercial
laws

¹ Kent, *Com. on Am. Law*, vol. i. p. 68; the 'Maria,' 1 Rob., 350; the 'Recovery,' 6 Dod. R., 349; and see Vol. ii. p. 412.

² *Report of Decisions of Commissioners between U. S. and Great Britain*, 1856.

and commercial regulations, the proclamations and manifestoes of particular States. 'These public documents furnish, at all events,' says Phillimore, 'decisive evidence against any State which afterward departs from the principles which it has thus deliberately invoked ; and, in every case, thus clearly recognise the fact that a system of law exists which ought to regulate, and control, the international relations of every State.'¹

Decisions
of local
courts

§ 25. The same remarks are applicable to the *decisions of local courts*. The adjudications of questions arising from international relations by such tribunals are not obligatory upon other States, except so far as they conform to general principles and established usages ; but as many questions can be decided only in this way, we may derive from this source many rules relative to the positive or practical law of nations. Such decisions, however, from their very nature, are of very limited authority, as expositions of the rules of international law ; but the reasons given by the judges, and the precedents referred to in their opinions, furnish a vast fund of information on the particular points discussed. And where such opinions result from a liberal and enlarged inquiry, the decisions are well calculated to strengthen and embellish the conclusions of reason.²

Text-
writers

§ 26. Another source, and perhaps the most fruitful of all, is formed *of the works of text-writers* of approved authority, showing the usage of nations, or the general opinion, respecting their mutual conduct, with the definitions and modifications introduced by general consent. As a general rule, authors of text-books and treatises on international law have risen above the local interests and prejudices which too often influence the writings of diplomatists, and even the decisions of courts, and have treated the subject in a philosophical spirit worthy of all commendation, and which causes their opinions to be referred to as authority on all disputed questions. Of course we cannot expect to find a complete uniformity of opinions in these writers, but there is a very general concurrence of views on all the great and leading principles which they have discussed. 'In cases where the principal jurists agree,' says Kent, 'the presumption will be very great

¹ Polson, *Law of Nations*, § 3 ; Phillimore, *Int. Law*, vol. i. § 57 ; the 'Santa Cruz,' 1 *Rob.*, 61.

² Duer, *On Insurance*, vol. i. p. 479 ; *Griswold v. Waddington*, 15 *Johns. R.*, 57 ; 16 *Johns. R.*, 438.

in favour of the validity of their maxims ; and no civilised nation, that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law.' Sir James Mackintosh, in his speech on the annexation of Genoa to the kingdom of Sardinia, says : ' It is not my disposition to over-rate the authority of this class of writers, or to consider authority in any case as a substitute for reason. But these eminent writers were, at least, necessarily impartial. Their weight, as bearing testimony to general sentiment and civilised usage, receives a new accession from every statesman who appeals to their writings, and from every year in which no contrary practice is established, or hostile principles avowed . . . I have never heard their principles questioned, but by those whose flagitious policy they had by anticipation condemned.'¹

§ 27. But it is not entirely upon their unanimity of opinion on great principles that the authority of text-writers has so great weight in the settlement of controversies between States. As a general rule, reference is made to those who wrote before the cause of the controversy arose, and who are therefore impartial. Moreover, it may be that the text-writers belonging to the very country which is urging a demand have, in advance, pronounced against it. ' If the authority of Zouch,' says Phillimore, ' of Lee, of Mansfield, and, above all, of Stowell, be against the demand of England ; if Valin, Domat, Pothier, and Vattel be opposed to the pretensions of France ; if Grotius and Bynkershoek confute the claim of Holland, Puffendorf that of Sweden ; if Heineccius, Leibnitz, and Wolff array themselves against Germany ; if Story, Wheaton, and Kent condemn the act of America, it cannot be supposed (except, indeed, in the particular epoch of a revolution, when all regard to law is trampled under foot) that the *argumentum ad patriam* would not prevail ; at all events, it cannot be doubted that it *ought* to prevail, and should the country relying upon such authority be compelled to resort to arms, that the guilt of the war would rest upon the antagonist refusing to be bound by it.'²

¹ Kent, *Com. on Am. Law*, vol. i. p. 19 ; Mackintosh, *Miscell. Works*, p. 704 ; Suarez, *De Legibus*, lib. vi. ; the ' Maria,' 1 Rob., 360 ; Wheaton, *Elem. Int. Law*, pt. I. ch. i. § 12 ; Bello, *Derecho Internacional*, Noc. prel. 87.

² Phillimore, *Int. Law*, vol. i. § 60 ; Triquet et al. v. Bath, 3 Burr. R., pp. 14-80.

**Treaties
and
compacts**

§ 28. Express *compacts* between States, and *treaties* of peace, alliance, and commerce, declaring, modifying, or defining the rules which regulate their mutual intercourse, furnish another fruitful source of international law. So also do treaties made for the purpose of mitigating the rigour of war, such as the Declaration of Paris, 1856 ; the Declaration of St. Petersburg, 1868 ; the Convention of Geneva, 1864, and the Additional Articles thereto, 1868. Such treaties and conventions are of binding force only upon the contracting parties, and they cannot modify the original and pre-existing law of nations to the disadvantage of those States which are not direct parties to these compacts ; but where they relax the rigour of the primitive law in favour of others, or furnish a more definite rule of practice in matters which have given rise to conflicting pretensions, the conventional laws thus introduced are not only obligatory upon the contracting parties, but constitute a rule to be observed by them toward the rest of the world. And although one or two treaties, varying from the general usage and custom of nations, cannot alter the pre-existing international law, yet an almost perpetual succession of treaties, establishing a perpetual rule, will go very far toward proving what that law is upon a disputed point.¹

**Their
effect on
meaning
of terms**

§ 29. Thus the consent of several nations, evidenced by treaties, to adopt a particular interpretation of a particular term, is, in the absence of other testimony, strong evidence that such is the true international meaning belonging to it. It is true that no treaty between two or more States can affect the general principles of international law, or directly prejudice the interests of others, though it may do so indirectly by positively declaring the interpretation to be given to a doubtful term, and thus laying down a principle binding, on them at least, in their intercourse with the rest of the world. This doctrine is laid down with great precision by Lord Grenville in his speech in the House of Peers on the convention with Russia in 1801. We adopt Sir R. Phillimore's synopsis of the part relating to *contraband of war*. 'He argued that, by the

¹ Wheaton, *Elem. Int. Law*, part i. ch. i. § 12 ; Heffter, *Droit International*, § 8 ; Massé, *Droit Commercial*, liv. i. tit. ii. ch. ii. ; Ortolan, *Diplomatie de la Mer*, liv. i. ch. v.

language of that convention, a new sense, and one hitherto repudiated by Great Britain, with respect to *contraband of war*, would be introduced, so far at least as Great Britain was concerned, into *general* international law ; inasmuch as some provisions of the treaty, with respect to what should be considered *contraband of war*, were merely *prospective*, and confined to the *contracting parties*, England and Russia, while other provisions of the same treaty were so couched in the preamble, the body, and certain sections which contained them, as to set forth, not the concession of a *special* privilege to be enjoyed by the contracting parties only, but a *recognition* of one universal pre-existing right : they must be taken as laying down a *general rule* for all future discussion with *any Power whatever*, and as establishing a principle of law which was to decide *universally* on the just interpretation of the technical term *contraband of war*.¹

§ 30. State papers, and *diplomatic correspondence* between statesmen distinguished for their character and learning, frequently contain much valuable information respecting the particular points and questions of international law which are discussed by them.² And perhaps these discussions exhibit the views and opinions of particular States more correctly than the compacts or treaties which may result from them, as such conventions are always more or less the result of compromise or temporary necessity. Moreover, these documents sometimes contain important admissions of what is, or ought to be, the law on points not immediately involved in the conflicting pretensions which have given rise to such discussions.

¹ Wheaton, *Elem. Int. Law*, part iv. ch. iii. § 29 ; Phillimore, *Int. Law*, vol. i. § 42 ; Hansard, *Parliamentary Debates*,—1801.

² In 1886, by order of the Congress of the United States, Dr. Francis Wharton prepared a most valuable and erudite *Digest of the International Law of the United States*, in three large volumes. In his report he states that he relied on (1) Presidents' messages, (2) opinions and reports of Secretaries of State, (3) opinions of Attorneys-General, (4) opinions of Federal Courts, (5) papers emanating from the War, Navy, and Interior Departments, (6) unofficial letters of leading Statesmen, and from the Jefferson, Madison, and Monroe papers ; (7) standard works on international law and history. Among others, the notes of Mr. Dana and Mr. Lawrence were employed, and a large use was made of Mr. J. C. Bancroft Davis's comments on treaties, published by the Department of State ; and frequent reliance was placed on Sir Sherston Baker's edition of General Halleck's *International Law*, as well as on the work published by President Woolsey.

The diplomatic correspondence growing out of particular negotiations may, therefore, very often be referred to with profit, in the investigation of questions connected with the rules of international law established by the consent and usage of nations.¹

¹ Wheaton, *Hist. Law of Nations*, p. 749.

CHAPTER III

SOVEREIGNTY OF STATES

1. A sovereign State defined—2. A State distinguished from a nation or people—3. A colony or dependency is a part of a State—4. But not itself a State—5. Mere fact of dependence does not destroy sovereignty—6. Nor occasional obedience and habitual influence—7. Nor feudal vassalage and paying tribute—8. They may impair or destroy sovereignty—9. Effect of a protectorate—10. Effect of a union of several States—11. A personal union of States—12. A real union—13. An incorporate union—14. A federal union—15. When a mere confederation—16. When a composite State—17. Semi-sovereign States—18. Sovereignty, how acquired—19. Identity not affected by internal changes—20. A State involved in civil war—21. Independence of a revolted colony or province—22. Recognition of such independence—23. State sovereignty, how lost—24. Changes of government—25. Change by internal revolution—26. By dismemberment of a part—27. By division of one into two or more separate States—28. By the incorporation of several States into one.

§ 1. A STATE is a body politic, or society of men united together for mutual advantage and safety. Such a society has affairs and interests peculiar to itself, and is capable of deliberation and resolution ; it is, therefore, regarded as a kind of moral person, possessing a will and an understanding, and susceptible of rights and obligations. From the nature and design of such a society, it is necessary that there should be established in it a *public authority*, to order and direct what is to be done by each individual in relation to the end and object of the association. This political authority, whether vested in a single individual or in a number of individuals, is properly the *sovereignty*¹ of the State. This term, however,

A sovereign
State
defined

¹ For *sovereignty*, see Sir G. C. Lewis, *Remarks on the Use and Abuse of Some Political Terms* (Oxford : 1877), ed. by Sir R. K. Wilson, Bart., pp. 37-49, and note by editor, pp. 179-181 ; Sir H. S. Maine, *Ancient Law*, ch. iv. ; *Early Hist. of Institutions*, Lect. xii. ; Austin, *Jurisprudence*, Lect. vi. ; Hammond's *Lieber's Hermeneutics*, note D, by editor, p. 250 seqq., and references there ; John C. Hurd, LL.D., *The Theory of our National Existence* (Boston : 1881), ch. iii., 'Sovereignty and Constitution.'

in international law is usually employed to express the external rather than the internal character of a nation, with respect to its ability or capacity to govern itself, independently of foreign Powers. *A sovereign State* may, therefore, be defined to be *any nation or people organised into a body politic and exercising the rights of self-government.*¹

Distin-
guished
from a
nation or
people

§ 2. A *State* is distinguishable from a *nation* or a *people*, since the former may be composed of different races of men, all subject to the same supreme authority. Thus, the Austrian, Russian, British, and Ottoman empires are composed of a variety of nations and people. So, also, the same nation or people may be subject to, or compose, several distinct and separate States. Thus the Poles are subject to the dominion of Austria, Germany, and Russia, respectively ; and the Italians, before the unification of Italy in 1860, used to constitute several distinct and independent sovereignties. But the Jewish nation is not a State ; nor are the gipsies, or pirates, or bandits, although they may be in large numbers, and are living under certain rules for mutual protection. Great Britain, however, granted the right of legation, in 1662, to the pirates of Tunis, Tripoli, and Algiers, and they have been treated as a State by other nations. These pirates, however, acknowledged themselves to be subject to the Porte, and the treaties were ratified by the Sultan.² The terms 'nation' and 'people' are frequently used by writers on international law as synonymous with the term 'States.'³

A colony
is a part
of a State

§ 3. The sovereignty of a State has reference to its political character, rather than to the nature of its territorial possessions. The territory of some States is in one compact body, like Belgium, Mexico, and the United States, while the territory of other States, like that of Great Britain, consists of detached parts situate in every quarter of the habitable globe. Under the general appellation of *State* are included

¹ Grotius, *De Jure Belli*, lib. i. cap. i. § 14 ; Vattel, *Droit des Gens*, liv. i. ch. i. § 4 ; Wheaton, *Elem. Int. Law*, pt. i. ch. ii. § 12 ; Burlamaqui, *Droit de la Nat. et des Gens*, tom. iv. pt. i. ch. iv. ; Martens, *Précis du Droit des Gens*, §§ 16-19 ; Gardén, *De la Diplomatie*, liv. i. § 3 ; Bello, *Derecho Internacional*, pt. i. ch. i. § 1 ; Heffter, *Droit International*, §§ 16-25 ; Merlin, *Répertoire*, s.v. 'souveraineté.'

² See Ch. xiii. § 8 ; the 'Serhassan' pirates ; 2 *W. Rob.*, 354 ; the 'Helena,' 4 *Rob.*, 3.

³ Phillimore, *Int. Law*, vol. i. 65 ; Rayneval, *Int. du Droit de la Nat.*, liv. i. ch. iv.

all the possessions of a nation, wheresoever situated, so that a *colony*, however distant, is, in the eye of international law, as much a part of the State which establishes it as is a city or province belonging to its most ancient territory. By a sovereign State is meant a community, or number of persons, permanently organised under a sovereign government of their own ; and by a sovereign government is meant a government, however constituted, which exercises the power of making and enforcing law within a community, and is not itself subject to any superior government. These two factors, one positive, the other negative—the exercise of power and the absence of superior control—compose the notion of sovereignty, and are essential to it.¹

§ 4. As a colony, a possession, or a dependency constitutes only a part of the State, it cannot in itself be regarded, in international law, as a distinct political organisation. Hence, any public or private corporation, created by, and deriving its authority from, a State cannot of itself constitute a separate and independent sovereignty. Thus, the East India Company, although exercising the sovereign powers of peace and war, with respect to the native princes and people, acted in subordination to the supreme power of the British Empire, and was represented by the British Government in all its relations with foreign sovereigns and States.

§ 5. The mere fact of dependence, however, does not prevent a State from being regarded in international law as a separate and distinct sovereignty, capable of enjoying the rights and incurring the obligations incident to that condition. Much more importance is attached to the nature and character of its connection with other States, and the degree and extent of its dependence. Thus, many States, regarded as sovereign, do not exercise the right of self-government entirely independent of other States, but have their sovereignty limited and qualified in various degrees, either by the character of their internal constitution, by stipulations of unequal

¹ Montague Bernard, *Hist. Account of Amer. Civ. War*, 107 ; Vattel, *Droit des Gens*, liv. i. ch. xviii. § 210 ; Wildman, *Int. Law*, vol. i. p. 40 ; Grotius, *De Jur. Bel. ac Pac.*, lib. i. cap. iii. § 7 ; Heineccius, *Elementa Juris Nat. et Gent.*, lib. i. § 231 ; Puffendorf, *Jus Nat. et Gent.*, lib. viii. cap. xii. § 5 ; Bowyer, *Universal Public Law*, ch. xxvii.

treaties of alliance, or by treaties of protection or of guarantee made by a third Power.¹

Occasional
obedience

§ 6. Nor is the sovereignty of a particular State necessarily destroyed by its mere nominal obedience to the commands of others, nor even by an habitual influence exercised by others over its councils. Thus, the city of Cracow, in Poland, with its territory, was declared by the Congress of Vienna, in 1815, to be a perpetually free, independent, and neutral State, under the protection of Russia, Austria, and Prussia. Although its councils were habitually influenced by these Great Powers, it was, nevertheless, regarded in international law as a sovereign State; and when, by the convention of 1846, it was annexed to the empire of Austria, the Governments of Great Britain, France, and Sweden protested against the proceeding as a violation of the Act of 1815, by which it was recognised as an independent State.²

Tributary
States

Feudal
vassalage
and
suzer-
ainty

§ 7. So, also, tributary States. Tribute, like that formerly paid by the European maritime Powers to the Barbary States does not necessarily affect the sovereignty of the tributary; nor does a feudal dependence or vassalage necessarily impair the sovereignty of a vassal State. A Power having given a sovereignty in fief to another, the sovereign of the latter has rendered himself voluntarily feudatory to the grantor; and the constitution of a fief causes certain private rights and certain reciprocal duties to arise between the suzerain (*Dominus feudi*) and the vassal, particularly that of mutual fidelity. So they may not make war on each other. But the homage does not prejudice the territorial rights of the vassal, nor his relations with foreign States, unless these relations destroy the feudal connection. Thus there was a nominal vassalage of Naples to the Papal See prior to 1818. The position of such a State is not *necessarily* affected by a connection of this kind with others. The law regards the

¹ Vattel, *Droit des Gens*, lib. i. ch. i. §§ 5, 6; Phillimore, *Int. Law*, vol. i. § 77; Riquelme, *Derecho Pub. Int.*, tom. i. p. 104. Another modification of the autonomy of a State, without causing forfeiture of sovereignty, is the voluntary restriction by a State of certain sovereign rights for the benefit of another State, such as voluntary public servitudes ('*servitutes juris gentium voluntariæ*'). These restrictions were formerly common in Germany.

² Martens, *Nouveau Recueil*, tom. ii. p. 386; Kluber, *Acten des Wiener Cong.*, b. v. § 138; Ortolan, *Diplomatie de la Mer*, liv. i. ch. ii.; De Cussy, *Précis Historique*, p. 7; Martens, *Précis du Droit des Gens*, §§ 19 et seq.

fact of sovereignty rather than the mere name by which it is designated.¹

§ 8. But the character of a State *may* be legally affected by its connection with others, and its sovereignty will be considered as impaired or entirely destroyed, according to the nature of the compact, the extent of the influence exercised by the superior, and the obedience acknowledged or rendered by the inferior ; no matter whether such condition results from political organisation or from treaties of unequal alliance and protection. If a State, in either of these modes, parts with its rights of negotiation and treaty, and loses its essential attributes of independence, it can no longer be regarded as a sovereign State, or as a member of the great family of nations. Its legal *status* is not changed by a loss of relative power, but by a loss of the essential attributes of independence and sovereignty—*the right to exercise its volition and the capacity to contract obligations*.²

These may
affect
sovereignty

§ 9. The effect of a *protectorate* upon the sovereignty of a State must depend entirely upon the character and conditions of the protection afforded. No doubt, one State may place itself under the protection of another without losing its international existence as a sovereign State, if it retains its capacity to treat, to contract alliances, to make peace and war, and to exercise the essential rights of sovereignty. But these rights must be retained *de facto*, as well as *de jure*, for although a State may retain the forms of independence, if it be practically and notoriously governed by officers appointed by another State, and incapable of exercising its own volition, it will be regarded as a mere dependence of the governing Power.³

Effect of a
protectorate

¹ Bodin, *De Repub.* i. 9 ; Scheidemantel, *De Nexu Feudali inter Gentes* ; Gunther, *Völkerr.*, i. 135 ; Moser, *Vers.*, i. 7 ; Ward, *Hist. Law of Nations*, vol. ii. p. 69 ; Bynkershoek, *Quæst. Jur. Pub.*, lib. i. cap. xvii. ; Heffter, *Droit International*, §§ 30–31. Egypt is a province of Turkey ; she has no separate *jus legationis*, and her flag is the flag of Turkey ; but by a Convention of October 24, 1885 (ratified November 24, 1885), it was agreed between England and Turkey that they should both send a High Commissioner to Egypt to adopt measures for the general settlement of Egyptian affairs. See further on the international position of Egypt, the 'Charkieh,' *L.R.* 4, Ad. 84 ; and Abd-ul-Messih v. Farra, *L.R.* 13 *App. Cas.* 431.

² Fletcher v. Peck, 6 *Cranch.*, p. 146 ; the Cherokee Nation v. the State of Georgia, 5 *Peters.*, p. 1 ; the U. S. v. Rogers, 4 *Howard*, p. 572 ; Martens, *Précis du Droit des Gens*, § 820.

³ Ortolan, *Diplomatie de la Mer*, liv. i. ch. ii. ; Martens, *Nouveau*

**Effect of a
union of
States**

§ 10. Two or more sovereign States may be united together under a common ruler, or by a federal compact ; and it will depend upon the nature of this union or confederation whether such States retain their separate sovereignty, notwithstanding this connection with others. If each separate State retains the essential qualities of independence,—the right of will and judgment, and the full capacity to contract obligations,—it will still be regarded as a distinct society or body politic, possessing the rights of sovereignty, and subject to its duties ; but if it has lost these qualities by such

Recueil, tom. ii. p. 663 ; Wheaton, *Hist. Law of Nations*, pp. 5, 56–60 ; Vattel, *Droit des Gens*, liv. i. ch. xvi. § 192.

**Adminis-
tration of
Cyprus by
England**

By a Convention of defensive alliance between Great Britain and Turkey, June 4, 1878, it was agreed, that if Batoum, Ardahan, Kars, or any of them should be retained by Russia, and if any attempt should be made at any future time by Russia to take possession of any further territories of the Sultan in Asia, England engaged to join the Sultan in defending them ; and in return the Sultan promised to introduce reforms, to be agreed upon, into the government, and for the protection, of the Christian and other subjects of the Porte ; and in order to enable England to execute her engagement, he consented '*to assign the island of Cyprus to be occupied and administered by England.*'

In an annex to this Convention, made July 1, 1878, England agreed to the following conditions :—(1) That a Mussulman religious tribunal should continue to exist in Cyprus for the exclusive cognizance of religious matters concerning the Mussulman population ; (2) that a joint Mussulman and British authority should administer the property belonging to mosques and other religious establishments in Cyprus ; (3) that England would pay to the Porte whatever then was the existing excess of revenue over expenditure in the island ; this excess to be calculated on the average of the last five preceding years, stated to be 22,936 purses, and to the exclusion of the produce of State and Crown lands let or sold during that period ; (4) that the Porte might sell and lease lands in Cyprus belonging to the Ottoman Crown and State (*Arasii Miriye' ve emlaki hounmayoun*), the produce of which does not form part of the revenue of the island referred to in Art. 3 ; (5) that the English Government might purchase compulsorily land required for public purposes or land which is uncultivated ; (6) that if Russia should restore to Turkey Kars and the other conquests made by her in Armenia during the last preceding war, Cyprus would be evacuated by England.

By an Agreement made at Constantinople, August 14, 1878, it was declared to be understood between the High Contracting Parties that the Sultan, in assigning Cyprus to be occupied and administered by England, 'thereby transferred to and vested in Her Majesty the Queen for the term of the occupation, and no longer, full powers for making laws and conventions for the government of the island in Her Majesty's name, and for the regulation of its commercial and consular relations and affairs free from the Porte's control.' By virtue of the above authority a High Court is established in Cyprus, in which, according to the words of the Ordinance, and subject to other provisions of the same, 'criminal and civil jurisdiction is, so far as circumstances admit, exercised on the principles of, and in conformity with, the statute law and other law for the time being in force in and for England.'

union with others, either by becoming subject to their will, or by creating a new national power, of which it is only a component part, it can no longer be regarded, in the eye of international law, as a sovereign State, although it may retain many of its sovereign rights with respect to its confederates.¹

§ 11. A union of two or more States under a common sovereign is called a *personal union*, if there is no incorporation, and if the component parts are united with a perfect equality of rights. Thus, Hanover and the United Kingdom of Great Britain and Ireland were at one time subject to the same prince, but there was no dependence on each other and both retained their respective national rights of sovereignty. Sometimes the individuality of the State is merged by such personal union (*unio personalis*), and, with respect to its external relations, remains for a time in abeyance ; but emerges again on the dissolution of the union and resumes its rank and position as an independent sovereign State.²

§ 12. A *real union* of different States, under a common sovereign, is where the several component parts are not only united under the same sceptre, but the sovereignty of each is merged in the general sovereignty of the empire, as to their international relations with foreign Powers, although still retaining respectively their distinct fundamental laws and other political institutions. Thus the Austrian monarchy, prior to 1849, was a *real union*, composed of the hereditary dominions, the kingdoms of Hungary, Bohemia, and other States, each of which retained a separate sovereignty with respect to its co-ordinate States, but were component parts of the empire with respect to their international relations with other Powers. By the Constitution of 1849 and the Patent of 1851 a more central system was adopted, and provision was made for uniform municipal legislation.³

§ 13. An *incorporate union* is where several States are united under a common sovereign, and a common govern-
An incorporate union

¹ Martens, *Précis du Droit des Gens*, §§ 20-29 ; Wheaton, *Elem. Int. Law*, pt. i. ch. ii §§ 15, 16 ; Klüber, *Droit des Gens*, pt. i. cap. i. § 27 ; Heffter, *Droit International*, §§ 19-29 ; Merlin, *Répertoire*, s.v. 'souveraineté.

² Phillimore, *Int. Law*, vol. i. § 76 ; Bowyer, *Universal Public Law*, ch. xxvii.

³ *Ann. Reg.* 1849, p. 317 ; *Annuaire des Deux Mondes*, 1852-3, pp. 541-545.

ment and legislature, although each may have its distinct laws and a separate but subordinate administration. Thus the three kingdoms of England, Scotland, and Ireland are incorporated into an empire, the sovereignty of each original kingdom being completely merged by their successive unions in the United Kingdom, which, in international relations, is regarded as a single State. There is no essential difference in international law between a *real* and an *incorporate* union of States, the sovereignty of the component parts being in both cases considered as completely merged in the new imperial sovereignty which results from such union.¹

**A federal
union**

§ 14. Sovereign States are sometimes firmly united together by a federal compact, without acknowledging any common sovereign. This kind of union is, perhaps, less frequent among monarchies than among States which have a republican form of government. From the extremely complicated nature of these leagues or federal compacts, it is sometimes very difficult to determine how far the sovereignty of each nation is affected or impaired by the conditions or regulations of such union. These compacts are divided by publicists into two general classes—*confederated States* and *composite States*.

**Con-
federated
States**

§ 15. By a *confederation*, or *system of confederated States*, we understand that kind of union, or compact, which does not essentially differ from an ordinary treaty of equal alliance. The resolutions of the federal body are enforced not as laws directly binding upon the individual subjects of each State, but upon each separate government which adopts them, and gives them the force of law within its own jurisdiction; thus leaving to each State the exercise of its own will and responsibility in its general intercourse with foreign Powers.

The Swiss Confederation of 1815, established under the mediation of the Allied Powers, and guaranteed by the Congress of Vienna, has been regarded by some text-writers as a mere league or system of confederated States, not differing essentially from a treaty of perpetual alliance between independent communities, in which each member of the union retains its own sovereignty unimpaired. But as the Diet formed by the twenty-two cantons of Switzerland had power to regulate the tariff of frontier duties, to provide for the

¹ Merlin, *Répertoire*, s.v. 'souveraineté.'

common protection, to support a common army, with the exclusive power of declaring war and concluding treaties of peace, alliance, and commerce with foreign States, it seems that the essential qualities of State sovereignty were merged in the Diet, and that the sovereign power of each separate canton was greatly impaired, so far as international relations with foreign Powers were concerned. The revision of the Constitution in 1874, strengthened the executive authority so very considerably, that Switzerland must now be regarded as a composite State, and not as a confederation.

The old German Confederation, established by the Federal Act of 1815, was formed between the free cities of Germany, the Emperor of Austria, the King of Prussia, and other German States, and, having for its declared object the preservation of the internal and external security of Germany, and the independence and inviolability of the confederated States, left to each member the power of contracting alliances and making treaties with other foreign States, except with an enemy against whom the Confederation had declared war, and provided that such treaties or compacts were not directed against the security of the Confederation or the individual States of which it was composed. Austria being excluded from this Confederation after the war between her and Prussia in 1866, the Confederation was reformed under the title of North German Confederation. But the desire of establishing German unity, which had been projected since the Congress of Frankfort, 1848, was fully developed in 1871 by the union of Bavaria, Baden, Hesse, and Würtemberg to the Confederation, which then assumed the name of the German Empire. The King of Prussia is President of the Confederation, under the title of Emperor of Germany, and the Imperial laws take precedence over the laws of the component States, although the heads of these States retain their place as sovereigns.

The Confederation of 1781, between the United States of North America, was nothing more than a *system of confederated States*. The difficulty of enforcing the laws and regulating foreign affairs of the government led to the adoption of a Constitutional Union.¹

¹ Wheaton, *Elem. Int. Law*, pt. i. ch. ii. §§ 21-25 ; Wheaton, *Hist. Law of Nations*, pp. 447 et seq. ; Story, *On the Constitution*, b. ii. ch. iii. ;

A composite
State

§ 16. A *composite State*, or *supreme federal Government*, results from a grant of supreme federal powers to the government of the union, with the consequent limitations imposed upon the separate governments of the several compact States. Each separate State may retain its own legislature, and its distinct laws and administration, and its separate sovereignty may still subsist internally in respect to its co-ordinate States, and, in respect to the supreme federal government, in questions of power not expressly granted to it; but in all external relations its sovereignty is completely merged and destroyed.

The union of the United States of America, by the federal constitution of September 17, 1787, is regarded, in international law, as a composite State, or supreme federal government. So, also, of the Republic of Mexico, both as a confederation of States and as a more central organisation under the departmental system.

Semi-
sovereign
States

§ 17. *Semi-sovereign States* do not possess all the essential rights of sovereignty, and, therefore, can be regarded as subjects of international law only indirectly, or at least in a subordinate degree. Such States must generally, in war, share the fortunes of their protector, and, in peace, must have his consent to the engagements they may desire to form with others. But as they are, for certain purposes, and under certain limitations, to be dealt with independently of such protectors, it is necessary to regard them as distinct organisations. These States are usually independent in their action, on mere questions of comity, such as the rights of strangers in their own territory, and of their own subjects in foreign countries.

The position of the Ionian Isles in 1815, the principalities of Moldavia, Wallachia, and Servia under the treaty of Adrianople, 1829, the existing position of Bulgaria and of the principality of Monaco, are examples of semi-sovereign States.¹

How sovereignty is
acquired

§ 18. The sovereignty of a State is acquired either at the origin of the civil society of which it consists, or when it

Kent, *Com. on Am. Law*, vol. i. pp. 212 et seq.; Hamilton, *The Federalist*, No. xv.; Heffter, *Droit International*, § 21; Ortolan, *Diplomatie de la Mer*, liv. i. ch. ii.

¹ Phillimore, *On Int. Law*, vol. i. § 78; Wheaton, *Elem. Int. Law*, pt. i. ch. ii. § 13; Moser, *Beiträge*, &c., b. i. p. 508.

separates itself from the community of which it formed a part, and assumes the rights and obligations of a distinct and independent political organisation. All questions with respect to the origin of States belong to the province of political philosophy, rather than to that of international law. As has already been remarked, the sovereignty of a State, as considered in international law, is not determined by the character of its origin, the extent of its power or domain, or by the nature of its internal government, but by its relations to others and its capacity to deliberate and act for itself.¹

§ 19. A State, as to the individual members of which it is composed, is a fluctuating body, being kept up by a constant succession of new members ; so, also, its form of government and municipal constitution may be subjected to frequent alterations and changes ; but these fluctuations and changes in the constituent parts of the body politic, and in their relations to each other, do not affect the character of the body itself, in its external relations to other communities,—that is, in international law. The State itself remains the same political body, until its identity is destroyed by interruption in its existence as a separate and distinct society ; and it neither loses any of its rights, nor is discharged from any of its obligations, by any mere municipal change or internal revolution.²

Identity
not
affected
by in-
ternal
changes

With respect to the North American Indians, upon the discovery of the American continent, the principle was asserted or acknowledged by all European nations, that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments ; which title might be consummated by possession. This principle gave to the nation making the discovery the sole right of acquiring the land and making settlements upon it. The relations which were to exist between the discoverers and the natives were to be regulated by themselves. In the establishment of these relations the rights of the original inhabitants were in no case entirely disregarded, but were necessarily to a considerable extent impaired. They were admitted to be the rightful occupants of the soil, with a

Status of
North
American
Indians

¹ Phillimore, *Int. Law*, vol. i. § 264 ; Klüber, *Droit des Gens*, pt. iii. ch. i. § 23 ; Heffter, *Droit International*, §§ 23, 24.

² Rutherford, *Institutes*, b. ii. ch. x. §§ 12, 13, 14 ; Bello, *Derecho Internacional*, pt. i. cap. i. § 8 ; Merlin, *Répertoire*, s.v. 'souveraineté.'

legal as well as just claim to retain possession of it, and to use it according to their discretion ; but their rights to complete sovereignty as independent nations were necessarily diminished, and their power to dispose of the soil by their own will to whomsoever they pleased was denied.

While the rights of the natives as occupants were respected, it was asserted that the ultimate right was in the discoverers, who claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil while yet in the possession of the natives. These grants have been understood to convey a title to the grantees, subject only to the Indian right of occupancy. The Indian tribes were not conceded the natural capacity to hold absolute title to land, except in cases specially provided by treaty.¹

A certain district, called the 'Indian Territory,' was guaranteed by the United States to the natives. It includes a tract west of Arkansas and north of Texas. The western boundary was fixed May 26, 1824, on a meridian forty miles west of the south-western corner of the State of Missouri ; the southern boundary is coincident with the boundary of Mexico, as fixed by the Spanish treaty of February 22, 1819 ; the northern boundary is the south line of Kansas, as defined by the organic Act of the territory of Kansas, May 30, 1854.

The territory so set apart for the Indians remained en-

¹ It was decided by the Supreme Court of the United States in 1831 that the Cherokee nation of Indians, dwelling within the jurisdictional limits of the United States, was not a foreign State in the sense in which the term is used by the Constitution, nor entitled as such to proceed in that court against the State of Georgia, but it was admitted that the Cherokees formed a State or distinct political society, capable of managing its own affairs and governing itself. The numerous treaties made with them by the United States recognise them as a people capable of maintaining the relations of peace and war. They were domestic dependent nations ; their relation to the United States was peculiar, and resembled that of a ward to his guardian, and they had an unquestionable right to the lands they occupied, until that right should be extinguished by a voluntary cession. (5 *Peters.*, 1.) In the following year the same court declared that the right given by European discovery was the exclusive right to purchase ; but this right was not founded on a denial of the right of the Indian possessor to sell. The Cherokee nation was a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia could not rightfully have any force, and into which the citizens of Georgia had no right to enter but with the assent of the Cherokees themselves, or in conformity with Treaties and with Acts of Congress. (6 *Peters.*, 515.) Therefore, a child of the tribe is not a citizen of the United States, although it may be born within the limits of those States.

tirely under the government of the tribes for some years, a few agents of the United States residing within it for the performance of such engagements as had been promised by treaties.

Slavery became practically established ; and, upon the breaking out of the War of Secession in 1861, the sympathies of many Indians were with the South.

By the treaties of Washington in 1866 the Seminoles on March 21, the Choctaws and Chickasaws on April 28, the Creeks on June 14, and the Cherokees on June 19 consented to the occupation of their territory by military forces of the United States for protection, and declared slavery abolished. They also granted rights of way for railroads, agreed to sell the land adjacent, ceded certain of their lands to such other civilised Indians as the United States might wish to settle there, consented to the establishment of such courts as Congress might direct, agreed to such legislation as Congress and the President might deem necessary for the better administration of the rights of person and property within the territory (but not to annual tribal organisations, rights, laws, privileges, and customs), and consented to the organisation of a General Council to consist of one delegate from each tribe, and others in proportion of one to each thousand of the population. No General Council, however, was held till 1870. A constitution was drawn up in 1871, but was not to be binding on any tribe until adopted by them. The proceedings of the Convention were laid before Congress by the President, with the recommendation that the territory should be recognised under this form of government with such changes only as should reserve to Congress the power of approving or disapproving the legislative action of the territory, and to the Executive and Senate the appointment of the governor, the judges, and possibly some other officers of the Government.

By an Act of Congress passed the same year it is enacted that thereafter ' No Indian nation or tribe within the territory of the United States shall be acknowledged or recognised as an independent nation, tribe, or power with whom the United States may contract by treaty,—provided further that nothing herein contained shall be construed to invalidate, or impair, the obligation of any treaty, heretofore lawfully made and ratified

with any such Indian nation or tribe' (41 Con. Sess. 3, ch. 120).¹

Effect of
civil war

§ 20. Vattel has laid down the rule, that when a country is divided by a civil war, each faction is to be deemed an independent State, and that a foreign Power may assist those whose cause it deems to be just.² This doctrine of Vattel is probably founded upon a misconstruction of a passage of Grotius ; it is not reconcilable with reason or precedents, but is opposed to what Vattel himself has said with respect to the interference of one State in the internal affairs of another. If a foreign State may take part in the civil wars of its neighbours, there would be no limit to its right to interfere in their domestic affairs. His principle, that the parties to a civil war are independent of all foreign authority, and that no foreign Power has any right to judge of their acts toward each other, is correct. Both parties may be entitled to the rights of war toward each other, and consequently to the rights of belligerents with respect to foreign States as neutrals in the contest, such as the rights of blockades, of sieges, &c. But beyond those rights, which are necessarily incidental to a state of war, a foreign Power cannot, during the war, regard the two factions as independent States, and give assistance to the one whose cause it may deem to be just ! Such conduct would be a direct violation of the rights of sovereignty and independence. But even supposing that the two parties, from the very commencement of a civil war or a revolution, are to be treated in every respect as independent States, it by no means

¹ *Johnson v. McIntosh*, 8 *Wheat.*, 543 ; *Fletcher v. Peck*, 6 *Cranch*, 87, 142 ; *Cherokee Nation v. State of Georgia*, 5 *Peters.*, 1 ; *Worcester v. State of Georgia*, 6 *Peters.*, 5, 15 ; 3 *Opin. Att.-Gen.*, 322 ; *McKay v. Campbell*, 5 *Am. L. J. Rep.*, 407 ; Hough, *American Constitutions*, ii. 537. For construction and effect of provisions in particular treaties with Indian tribes, see *Meigs v. McClung*, 9 *Cranch*, 11 ; *Lattimer v. Poteet*, 14 *Pet.*, 4 ; *U. S. v. Brooks*, 10 *How.*, 442 ; *Mann v. Wilson*, 23 *Ib.*, 457 ; *U.S. v. Stone*, 2 *Wall*, 525 ; *Godfrey v. Beardsley*, 2 *McLean*, 412.

² As an example of this, he quotes the interference of the Prince of Orange, and the assistance granted by him to the English against James II. To this example may be added the assistance given by France in the War of Revolution to the United States, not merely by recognition, but by a secret treaty offensive and defensive, and this while at peace with great Britain. *Parl. Deb.*, 1819, vol. xl. 1256 ; *Canning's Speeches*, vol. v. p. 322. In 1866 the United States refused to recognise the *de facto* government of the Emperor Maximilian of Mexico, or the blockade of Matamoras, which his government had declared, notwithstanding that it had been formally recognised as a government by England, France, and Spain. *Ann. Reg.*, 1866 ; *ibid.* 1867.

follows that a foreign Power may render assistance to the one whose cause it may deem to be just. This would be constituting such foreign Power a judge of the *justice* of the war; whereas, if both parties are to be considered as independent States, the war is to be deemed, in international law, as *just* on both sides! Moreover, would the justice or injustice of the war be in itself a sufficient reason for the interference of a foreign Power? Certainly not.

The above-mentioned rule of Vattel has been copied by Wheaton without comment, and apparently without questioning its correctness. But, notwithstanding this implied endorsement of so high an authority, we have no hesitation in pronouncing the doctrine as not only erroneous, but exceedingly dangerous, from the fact that it justifies the most objectionable species of intervention in the internal affairs of States. But the language of Wheaton is more limited and cautious than that of Vattel; and when he says that other States 'may espouse the cause of the party which they believe to have justice on its side,' and that by so doing a State becomes 'the enemy of the party against whom it declares itself, and the ally of the other,' he probably means merely to express the legal results of such a declaration, and not to say that the justice or injustice of the cause would in itself justify such declaration, or authorise such interference. In this view, his language is reconcilable with other parts of his work.¹

§ 21. Whilst the civil war continues, or while a revolted colony or province is shaking off the bonds of its former government, a foreign State should either remain a passive spectator, or, if its own relations require diplomatic intercourse with the revolted society, it should treat such revolted society as a *de facto* government only, in its foreign relations, and not as an independent State with respect to its relations with its own sovereign, or its own metropolitan government.²

When a new State may be recognised

¹ Vattel, *Droit des Gens*, liv. ii. ch. vi. § 56; Grotius, *De Jur. Bel. ac Pac.*, lib. ii. cap. xviii. § 2; Wheaton, *Elem. Int. Law*, pt. i. ch. ii. § 7; Kent, *Com. on Am. Law*, vol. i. pp. 24, 25.

² The following opinion of Judge Daly, addressed to the Hon. Ira Harris, written at New York, December 21, 1861, is in favour of granting to the private ships of war of a *de facto*, although in the eyes of the United States not a *de jure*, State, the privileges of privateers instead of treating them as pirates. He says:—

Opinion of Judge Daly

'In compliance with your request at our conversation in Washington, I will put in writing the reasons why the Southern privateersmen should be regarded as prisoners of war, and not as pirates.'

But when the contest is virtually determined, and the revolted province or colony has virtually established its

‘ Privateering is a lawful mode of warfare, except among those nations who by treaty stipulate that they will not as between themselves resort to it. Pirates are the general enemies of all mankind, *hostes humani generis* ; but privateersmen act under and are subject to the authority of the nation or Power by whom they are commissioned. They enter into certain securities that they will respect the rights of neutrals ; their vessel is liable to seizure and condemnation if they act illegally, and they wage war only against the Power with which the authority that commissioned them is at war. A privateer does no more than is done by a man-of-war, namely, seize the vessel of the enemy, the prize or booty being distributed as a reward among the captors. The only difference between them is that the vessel of war is the property of the Government, manned and maintained by it, while the other is a private enterprise undertaken for the same general purpose, and giving guarantees that it will be conducted according to the established usages of war. In short, one is a public, the other a private, vessel of war, neither of which acquires any right to a prize taken until the lawfulness of the capture is declared, by a competent court, under whose direction the thing taken can be condemned and sold, and the proceeds distributed in such proportions as the court considers equitable. The Government of the United States declined to become a party to the International Treaty of Paris of 1856, and therefore the whole people of the United States, as well those who are maintaining the Government as those who are in rebellion against it, have never agreed to dispense with privateering. It is not our interest to do so. We are a maritime people with a large extent of sea-coast, which, while it leaves us greatly exposed to attacks by sea, at the same time affords facilities that render privateering to us one of our most effective arms in warfare. This was the case in our contest with England in 1812 ; and, should a war now grow out of the affair of the “Trent,” privateering would be indispensable to enable us to cope with so formidable a power as that of Great Britain.

‘ A great deal has been written against this mode of warfare, but nations, like individuals, act upon the instinct of self-preservation, and avail themselves of the natural defences which grow out of their situation ; and a system, therefore, which enables us to keep a small navy in peace and improvise a large one in war will never be relinquished because nations who have everything to lose, or little to gain by its continuance, desire that it should be abolished. Being, then, a legitimate mode of making war, what is the difference between the Southern soldier who takes up arms against the Government of the United States upon land and the Southern privateersman who does the same upon the water ? Practically there is none ; and if one should be held and exchanged as a prisoner of war, the other is equally entitled to the privilege. The court before which the crew of the “Jefferson Davis” were convicted as pirates held that they could not be regarded as privateers, upon the ground that they were not acting under the authority of an independent State, with the recognised rights of sovereignty. This objection applies equally to the men-of-war’s men in the Southern fleets, and to every soldier in the Southern army, none of whom are acting under the authority of a recognised Government. The Constitution defines treason to be the levying of war against the United States and the giving of aid and comfort to its enemies. All of them are engaged in doing this ; and although the Southern privateersmen may fall specifically under the provisions of the Act defining piracy, the guilt of the one is precisely the same as that of the other. The question then arises—As there is in point of fact no differ-

independence, foreign Powers, without any just offence to the metropolitan country, may recognise that independence and enoe between them, is every seaman or soldier that shall be taken in arms against the Government to be hung as a traitor or a pirate? If the matter is to be left to the courts, conviction and sentence of death must follow in every instance. In the case of the "Jefferson Davis," the court said that during civil war in which hostilities are prosecuted on an extended scale, persons in arms against the established Government captured by its naval or military forces are often treated not as traitors or pirates, but according to the humane usages of war. They are detained as prisoners until exchanged or discharged on parole, or, if surrendered to the civil authorities and convicted, they are respited or pardoned; but the court said this was a matter with which courts and juries had nothing to do; that it was purely a question of Government policy depending upon the decision of the executive or legislative department of the Government, and not upon its judicial organ.

'If this view be correct, the disposition of this matter rests exclusively with the Government, and its decision must be pronounced sooner or later, as every day increases the complication and difficulties growing out of the present state of things. Are the courts to go on? Is the Government prepared to say that every man in arms against the United States upon the land or upon the water is to be tried and executed as a traitor or pirate, either upon the ground that it is right, or upon the supposition that it will prove an effective means for suppressing the rebellion? That policy was tried by the Duke of Alva in the revolt of the Seven Provinces of the Netherlands, and 18,000 persons by his order suffered death upon the scaffold, the result being a more desperate resistance, the sympathy of surrounding nations, and the ultimate independence of the Dutch. Neither the constitution of the United States nor the Act against piracy was framed in view of any such state of things as that which now exists. The civil war which now prevails is in its magnitude beyond anything previously known in history. The revolting States hold possession of a large portion of the territory of the Union, embracing a great extent of the sea-coast and including some of our principal cities and harbours. They hold forcible possession of it by means of an army estimated at 300,000 men, and are practically exercising over it all the power and authority of government. They claim to have separated from the United States, to have founded a Government of their own, and are in armed resistance to maintain it. To reduce them to obedience, and to recover that of which they hold forcible possession, it has been necessary for us to resort to military means of more than corresponding magnitude, until the combatants on both sides have reached the prodigious number of 1,000,000 of men.

'The principal nations of Europe, recognising this state of things, have conceded to the rebellious States the rights of belligerents—a course of which we have no reason to complain, as we did precisely the same thing towards the States of South America in their revolt against the Government of Spain. It is natural that we should have hesitated to consider the Southern States in the light of belligerents before the rebellion had expanded to its present proportions: but now we cannot, if we would, shut our eyes to the fact that war, and war upon a more extensive scale than usually takes place between contending nations, actually exists. It is now, and it will be continued to be, carried on upon both sides by a resort to all the means and appliances known to modern warfare, and unless we are to fall back into the barbarism of the Middle Ages, we must observe in its conduct those humane usages in the treatment and exchange of prisoners which modern civilisation has

enter into full diplomatic and commercial relations with the new State as a separate and distinct sovereignty. It is not shown to be equally the dictates of humanity and policy. For every seaman that we have arrested as a pirate, they have incarcerated a Northern soldier, to be dealt with exactly as we do with the privateersmen. We have convicted as pirates four of the crew of the "Jefferson Davis," and there are others in New York awaiting trial. Are those men to be executed? If they are, then by that act we deliberately consign to death a number of our own officers and soldiers, the most of whom owe their captivity and present peril to the heroic courage with which they stood by their colours in a day of disastrous flight and panic.

' If such a course is to be pursued, it will not be very encouraging for the soldier now in arms for the maintenance of the Union, to know that what may be asked of him is to fight upon one side with the risk of being hanged upon the other, and in the face of the enemy with his line broken down, instead of rallying again, he may, in view of the possibility of a halter, deem it prudent to retire before the double danger. If, on the other hand, we convict these men as criminals and pause there, then the crime, of which we have declared them to be guilty, is not followed by its necessary consequence, the proper punishment. There is no terror inspired and no check interposed by such a procedure, for the plainest man in the South knows that the motive which restrains us from going further is the fact that execution of these men as pirates seals the doom of a corresponding number of our own people; that the account is equally balanced; that with ample means of retaliation they have the power to prevent, or if mutual blood is to be shed in this way, we and not they will have commenced it. By such a course nothing is effected, except to keep our own officers and soldiers in the cells of Southern prisons, subject to that mental torture produced by the uncertainty of their fate, which with the majority of men is more difficult to bear than the certainty of death itself, and obliges them to endure, in the ill-provided and badly-conducted prisons in which they are confined, sufferings, the sickening details of which are constantly before us in their published letters to their friends. "I little thought," writes the gallant Colonel Cogswell, of the regular service, "when I faced the storm of bullets at Edward's Ferry, and escaped a soldier's death upon the field, that it was only to be left by my country to die upon a gallows." And the nature of their sufferings will be understood when it is told that the noble-hearted and self-sacrificing Colonel Corcoran was handcuffed and placed in a solitary cell, with a chain attached to the floor, until the mental excitement produced by the ignominious treatment, combined with a susceptible constitution and the infectious character of the locality, brought on an attack of typhoid fever. Shall this state of things continue to exist? Let us take counsel of our common sense. These men are treated as criminals, because, while we give to the Southern soldiers the rights of war (for numerous exchanges of soldiers have taken place), we convict the Southern mariner of a crime punishable with death. Is there any reason, even upon the grounds of policy, for making this distinction? We have by the blockade of the whole Southern coast cut the privateersman off from bringing his prize into the ports of the South for adjudication, and the ports of all neutral nations being closed against him for such a purpose, he is deprived of means of making lawful prize, and must eventually convert his vessel into a ship of war, or degenerate into a pirate by unlawful acts which will make him amenable to the tribunal of every civilised nation. The comparative injury that may be done to our commerce by the few privateers which it will be now in the power of the rebellious States to maintain upon the ocean

necessary in such cases to await the acknowledgment of that independence by the former sovereign; of the fact of such independence, each State may judge for itself. 'The absence of all jurisdiction,' says Wildman, 'to determine the right, leads to the necessary consequence, that, when, in the result of a civil war, a State changes its government, or a province or colony that before had no separate existence is in the possession of the rights of sovereignty, the possession of sovereignty *de facto* is taken to be possession *de jure*, and any foreign Power is at liberty to recognise such sovereignty by treating with the possessor of it as an independent State. Where sovereignty is necessary to the validity of an act, no distinction is or ought to be made between sovereignties founded on a good or bad title. Few governments have been founded on free suffrage and election; most have originated in violence and faction. In international transactions possession is sufficient. Otherwise it would be necessary to

is as nothing compared to the disastrous and lasting consequences to the whole nation—to its industry, its commerce, and its future—that would grow out of making this war one of retaliatory vengeance. We have the fruitful experience of history to admonish us, that in such acts are sown the seeds of the dissolution of nations, and especially of republics. By according to the rebellious States the rights of belligerents, at least to the extent of exchanging prisoners, whether privateersmen, men-of-war's men, or soldiers, we do not concede to them the rights of sovereignty. There is a well-defined distinction between the two, recognised by the United States court in the case of *Rose v. Himley* (4 *Cranch*, 241). One may exist without the other, and by exchanging prisoners, therefore, we concede nothing and admit nothing, except what everybody knows, that actual war exists, and that, as a Christian people, we mean to carry it on according to the usages of civilised nations.

'The existing embarrassment is easily overcome; further prosecutions can be stopped, and in respect of privateersmen who have been convicted, the President, acting upon the suggestion of the court that tried them, can, by the exercise of the pardoning power, relieve them from their position as criminals, and place them in that of prisoners of war.

'In conclusion, we are apt to forget that we are carrying on this war for the restoration of the Union, and that every act of aggression not essential to military success will but separate more widely the two sections from each other, and increase the difficulty of cementing us again in one nationality. We are to remember that the people of the South, whose infirmity it has been to have very extravagant ideas of their own superiority, and whose contempt of the people of the North has been in proportion to their want of information respecting them, have been hurried into their present position by the professional politicians and large landed proprietors. . . . War, when conducted in accordance with the strictest usages of humanity, is a sufficiently bloody business, and if we are to add to its horrors by hanging up all who fall into our hands as traitors or pirates, we leave to the South no alternative but resistance to the last extremity.'

inquire into the origin of sovereignties, and to ascertain whether they are founded upon a good or upon a bad title. Such an inquiry could answer no good purpose, and would furnish ample occasion to disturb the peace of nations.' ¹ The civil war in the United States in 1861, was the occasion of much complaint on the part of the (Federal) Government of the United States that Great Britain should recognise the revolted (Confederate) States as belligerents, claiming that no war existed, or could exist, in the States, so long as they (the Federal States) possessed the sovereignty *de jure* of the whole dominion of the United States. But seeing that seven of the States of the Union had formed themselves into a republic, with a constitution of their own, and that the (Federal) Government issued a proclamation on the 19th April, 1861, placing the coasts of the revolted (Confederate) States under blockade, a measure which is evidence of a state of war, Great Britain issued a proclamation of neutrality on the 14th May, 1861, thereby admitting by implication her recognition of the revolted States as belligerents.

Recog-
nition, by
whom
made

§ 22. The recognition of the independence and sovereignty of a revolted province by other foreign States, when that independence is established in fact, is therefore a question of policy and prudence only, which each State must determine for itself; but this determination must be made by the sovereign legislative or executive power of the State, and not by any subordinate authority, or by the private judgment of individual subjects. And until the independence of the new State is recognised by the government of the country of which it was before a part, or by the foreign State where its sovereignty is drawn in question, courts of justice, and private individuals, are bound to consider the ancient state of things as remaining unaltered.² Referring to the term 'recognition,' Mr. Canning

¹ Wildman, *International Law*, vol. i. p. 57; Wicquefort, *L'Ambassadeur*, &c., lib. i. pp. 40, 57, 58.

² Wheaton, *Elem. Int. Law*, pt. i. ch. ii. § 10 et seq.; Martens, *Nouvelles Causes*, &c., tom. i. pp. 370-494; Garden, *De la Diplomatie*, liv. ii. § 6; Webster, *Works*, vol. vi. pp. 488-506; Kennett *v.* Chambers, xiv. *How. R.*, p. 38; Hoyt *v.* Gelston, 3 *Wheat. R.*, p. 324, note; the 'Manilla,' 1 *Ed. Ad. R.*, pt. i.; Bello, *Derecho Internacional*, pt. i. cap. i. § 7; the 'Santisima Trinidad,' 7 *Wheat. R.*, p. 305; the 'Pelican,' 1 *Ed. Ad. R.*, *Appen. D.*; the City of Berne, in Switzerland, *v.* the Bank of England, 9 *Ves.*, 347; Dolder *v.* the Bank of England, 10 *Ves.*, 352; *ibid.* 283; Thompson *v.* Powles, 2 *Sim.*, 194; Taylor *v.* Barclay, *ibid.*, 213; the United States of America *v.* Wagner, *Law R.*, 2 *Ch. App.*, 582.

stated in 1823 that 'the law of nations was entirely silent on this point,' but he attached this meaning to it:—'If the colonies say to the mother country, "We assert our independence," and the mother country answers, "I admit it," that is recognition in one sense. If the colonies say to another State, "We are independent," and that other State replies, "I allow that you are so," that is recognition in another sense of the term. That other State simply acknowledges the fact, or rather its opinion of the fact. But without a treaty of alliance and co-operation, that latter recognition could have no such effect as tranquillising the State, and establishing and confirming its independence.' [Recognition, according to Mackintosh, is used in two senses—Ist, as a technical term of international law, in which it denotes the explicit acknowledgment of the independence of a country by a State which formerly exercised sovereignty over it, such as the acknowledgment of the independence of Portugal and Holland by Spain, and of the American colonies by Great Britain. 2nd. A neutral country by measures of practical policy may imply an acknowledgment of the independence of another. This is a virtual recognition, the most conspicuous part of which is the act of sending and receiving diplomatic agents. It implies no guarantee, no alliance, no aid, no approbation of the successful revolt, no intimation of an opinion concerning the justice or injustice of the means by which it has been accomplished. These are matters beyond the jurisdiction of the neutral. It

As a matter of municipal law, no person can contract with or assist a revolted colony, or a part of another State, without leave of his own government, before the same have recognised the separate independence of the colony or part of a State. See *Jones v. Garcia del Rio*, 1 *Turn. and Russ.*, 297; *Yrisson v. Clement*, 2 *Car. and P.*, 223; the *United States v. Palmer*, 3 *Wheat.*, 610; *Cherriot v. Foussat*, 3 *Binn.*, 252. And it is submitted that those sections of the Foreign Enlistment Act, 1870 (33 and 34 Vict. c. 90), which prohibit illegal enlistment or building ships, &c., for any foreign State at war with any foreign State at peace with Great Britain, are by sect. 30 of the same Act extended to the case of a rebellion of such dimensions as to constitute a new government or nationality; that last-mentioned section defines 'foreign State' to include 'any foreign prince, colony, province, or part of any province or people, or any person or persons exercising, or assuming to exercise, the powers of government in or over any foreign country, colony, province, or part of any province or people.' Therefore it would seem to be equally unlawful for a foreign State to hire or build a ship in British waters to employ against insurgents, or for insurgents to fit out the same under similar circumstances, against a government in amity with Great Britain. Compare 59 Geo. III., c. 69, and case of the 'Salvador,' 6 *Moore, P.C.C.* (N.S.), 509.

would be an usurpation for it to sit in judgment on them. As a State it can neither condemn nor justify revolutions which do not affect its safety and are not amenable to its laws; a tacit recognition of a new State not being a judgment for the new government nor against the old, is not a deviation from perfect neutrality or a cause of just offence to the dispossessed ruler. These doctrines are not even controverted by the jurists of the Holy Alliance.¹

**The
Monroe
doctrine**

‘The Monroe doctrine’ takes its name from President Monroe’s Seventh Annual Message to Congress, delivered on December 2, 1823. Briefly, the doctrine is not to interfere in the internal concerns of Europe, while it repudiates the interference of the Allied Powers with the American continents. The Message is as follows :—

‘At the proposal of the Russian Imperial Government, made through the minister of the Emperor residing here, a full power and instructions have been transmitted to the minister of the United States at St. Petersburg to arrange, by amicable negotiation, the respective rights and interest of the two nations on the north-west coast of this continent. A similar proposal had been made by his Imperial Majesty to the Government of Great Britain, which has likewise been acceded to. The Government of the United States has been desirous, by this friendly proceeding, of manifesting the great value which they have invariably attached to the friendship of the Emperor, and their solicitude to cultivate the best understanding with his Government. In the discussions to which this interest has given rise and in the arrangements by which they may terminate, the occasion has been judged proper for asserting, as a principle in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonisation by any European Powers.]’

‘It was stated at the commencement of the last session that a great effort was then making in Spain and Portugal to improve the condition of the people of those countries, and that it appears to be conducted with extraordinary moderation. It need scarcely be remarked that the result has been

¹ *Works of Mackintosh*, vol. iii.

so far very different from what was then anticipated. Of events in that quarter of the globe, with which we have so much intercourse, and from which we derive our origin, we have always been anxious and interested spectators. The citizens of the United States cherish sentiments, the most friendly, in favour of the liberty and happiness of their fellow-men on that side of the Atlantic. In the wars of the European Powers in matters relating to themselves, we have never taken any part, nor does it comport with our policy to do so. It is only when our rights are invaded, or seriously menaced, that we resent injuries or make preparation for our defence. With the movements in this hemisphere we are of necessity more immediately connected, and by causes which must be obvious to all enlightened and impartial observers.

‘The political system of the Allied Powers is essentially different in this respect from that of America. This difference proceeds from that which exists in their respective Governments. And to the defence of our own, which has been achieved by the loss of so much blood and treasure, and matured by the wisdom of their most enlightened citizens, and under which we have enjoyed unexampled felicity, this whole nation is devoted. [We owe it, therefore, to candour and to the amicable relations existing between the United States and those Powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety.] With the existing colonies or dependencies of any European Power we have not interfered, and shall not interfere. But with the Governments who have declared their independence and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny by any European Power, in any other light than as the manifestation of an unfriendly disposition towards the United States. In the war between those new Governments and Spain, we declared our neutrality at the time of their recognition, and to this we have adhered, and shall continue to adhere, provided no change shall occur which in the judgment of the competent authorities of this Government shall

make a corresponding change on the part of the United States indispensable to their security.

'The late events in Spain and Portugal show that Europe is still unsettled. Of this important fact no stronger proof can be adduced than that the Allied Powers should have thought it proper, on a principle satisfactory to themselves, to have interposed by force in the internal concerns of Spain. To what extent such interposition may be carried on the same principle is a question to which all independent Powers whose Governments differ from them are interested, even those most remote, and surely none more so than the United States. Our policy in regard to Europe which was adopted at an early stage of the wars which have so long agitated that quarter of the globe nevertheless remains the same, which is not to interfere in the internal concerns of any of its Powers, to consider the Government *de facto* as the legitimate Government for us, to cultivate friendly relations with it, and to preserve those relations by a frank, firm, and manly policy; meeting in all instances the just claims of every Power, submitting to injuries from none. But in regard to these continents, circumstances are eminently and conspicuously different. It is impossible that the Allied Powers should extend their political system to any portion of either continent without endangering our peace and happiness; nor can anyone believe that our Southern brethren, if left to themselves, would adopt it of their own accord. It is equally impossible, therefore, that we should behold such interposition in any form with indifference. If we look to the comparative strength and resources of Spain and those new Governments, and their distance from each other, it must be obvious that she can never subdue them. It is still the true policy of the United States to leave the parties to themselves, in the hope that other Powers will pursue the same course.'

State
sovereignty,
how lost

§ 23. The sovereignty of a State may be lost in various ways. It may be vanquished by a foreign Power and become incorporated into the conquering State as a province, or as one of its component parts; or it may voluntarily unite itself with another in such a way that its independent existence as a State will entirely cease. Again, two sovereign States may become incorporated into one, so as to form a new sovereign

State in place of the other two whose independent existence, as States, is entirely destroyed by such incorporation.

Thus, the incorporation of the Seven United Provinces and the Austrian Low Countries, by the treaties of Vienna under the Prince of Orange, as King of the Netherlands, was the union of two distinct sovereignties, forming a single new sovereign State. By the incorporation of Wales, Scotland, and Ireland into Great Britain, and of Normandy and Brittany into France, these incorporated States lost their existence as distinct and substantive political bodies.¹

§ 24. Questions of great importance sometimes arise with respect to the international effects produced by internal changes in the form of government, and by a change in the sovereignty of a State, with respect to its duties and obligations toward others. These questions relate to treaties, public debts, the public domain, private rights of property, and to responsibility for wrongs done to the governments or subjects of other States. We will consider these matters—Ist, with

Changes
in the
govern-
ment of a
State

¹ Phillimore, *Int. Law*, vol. i. § 125; Puffendorf, *De Jure Nat. et Gent.*, lib. viii. cap. xii. § 9; Bello, *Derecho Internacional*, pt. i. cap. i. § 8. In 1859 an insurrection broke out in that part of the Pope's dominions known as the Romagna or the Legations. Sardinian troops entered the territory and encouraged the inhabitants in their resistance. The Sardinian Government nominated an Extraordinary Commissioner in Romagna, alleging that it was to prevent the national movement from leading to disorder. The late Cardinal Antonelli addressed a circular to the foreign Courts, declaring this act to be not only a violation of neutrality, but in reality an active co-operation with the rebels on the part of the Sardinian Government. The late Emperor Napoleon, writing to the Pope, December 31, 1859, declared that 'the Powers cannot disown the incontestable rights of the Holy See to the Legations.' On the other hand, the assembly of the Romagna formally cast off their allegiance to the Pope, asserting that, having in former centuries lived under their own statutes and laws, and in the beginning of the present century formed part of a civil kingdom, they were in 1815 placed under the temporal government of the Pope against their will; that they considered that government incompatible with Italian nationality, with civil equality and political liberty; that it had *de facto* abdicated its sovereignty by giving up its noblest prerogatives into the hands of Austrian generals, who for many years had held the civil and military governments of these provinces; and that the temporal government of the Pope was substantially and historically distinct from the spiritual government of the Church, which they would always respect. In 1870, Signor Lanza and his colleagues persuaded King Victor Emmanuel to occupy Rome, and on September 20 of that year a considerable Italian army appeared before the gates of Rome, under the pretext of affording protection to Pius IX. against revolutionary attacks. The Pope only made a formal resistance. After the ceremony of a plébiscite, or popular vote, Rome was declared part of the kingdom of Italy. See also on this subject *infra*, ch. v. § 5.

respect to the effects of a change in the internal forms of the government ; 2nd, with respect to the effects of a dismemberment of a State by the revolt or loss of a province ; 3rd, the effects of a division of one into two or more separate and independent States ; and, 4th, the effects of an incorporation of two or more separate States into one, forming a new and distinct sovereignty.¹

Changes
by in-
ternal
revolution

§ 25. As a general rule, a mere change in the form of government, or in the person of the ruler, does not affect the duties and obligations of a State towards foreign nations. All treaties of amity, commerce, and *real* alliance remain in force precisely as if no intervening change had taken place, except in cases where the compact relates to the form of government itself, or to the person of the ruler in the nature of a guaranty. Public debts, whether due to or from the revolutionised State, are neither cancelled nor affected by any change in the constitution or internal government of a State. So, also, of its public domain and right of property. If a revolution be successful, and a new constitution be established, the public domain and public property pass to the new government. The State, on the other hand, remains responsible for the wrongs done to the government or subjects of another State, notwithstanding any intermediate change in the form of its government or in the persons of its rulers. It is clear, that any government which *de facto* succeeds to any other government, whether by revolution or restoration, conquest or reconquest, succeeds to all the public property, to everything in the nature of public property, and to all rights in respect of the public property of the displaced Power. This right of succession is a right not paramount, but derived through the suppressed authority, and can only be enforced in the same way, and to the same extent, and subject to the same correlative obligations and rights, as if that authority had not been suppressed, and was itself seeking to enforce it. These results flow necessarily from the principle that the identity of a State is preserved, notwithstanding the accidental changes in its internal constitution.²

¹ Wildman, *Int. Law*, vol. i. p. 68 ; Grotius, *De Jur. Bel. ac Pac.*, lib. iii. cap. ix. §§ 8, 9, 10 ; Heffter, *Droit International*, § 25.

² U.S. v. MacRae, L. R. 8 Eq., 69 ; Vattel, *Droit des Gens*, liv. ii. ch. xii. §§ 183-197 ; Mabley, *Du Droit Public*, tom. i. pp. 111, 112 ; D'Agues-

§ 26. The dismemberment of a State, by the loss of a portion of its subjects and territory, does not affect its identity, whether such loss be caused by foreign conquest or by the revolt and separation of a province. Such a change no more affects its rights and duties, than a change in its internal organisation, or in the person of its rulers. This doctrine applies to debts due to, as well as from, the State, and to its rights of property and its treaty obligations, except so far as such obligations may have particular reference to the revolted or dismembered territory or province.¹

By dis-
member-
ment of a
part

§ 27. The case is slightly different where one State is divided into two or more distinct and independent sovereignties. In that case, the obligations which had accrued to the whole, before the division, are (unless they have been the subject of a special agreement) rateably binding upon the different parts. This principle is established by the concurrent opinions of text-writers, the decisions of courts, and the practice of nations. It was incorporated into the treaty by which the modern kingdom of Belgium was established. Kent says : ' If a State should be divided with respect to territory, its rights and obligations are not impaired ; and if they have not been apportioned by special agreement, those rights are to be enjoyed, and those obligations fulfilled, by all the parts in common.' Story says : ' It has been asserted, as a principle of common law, that the division of an empire creates no forfeiture of previously vested rights of property ; and this principle is equally consonant with the common sense of mankind and the maxims of eternal justice.'²

By
division

§ 28. The converse of this rule is also generally true ; that is, where several separate States are incorporated into a new sovereignty, the rights and obligations which had accrued to

By incor-
poration

seau, *Œuvres*, ch. i. p. 493, § 4 ; Montesquieu, *Esprit des Lois*, liv. xxvi. ch. xx. ; Grotius, *De Jur. Bel.*, lib. ii. cap. ix. § 8 ; Tindall, *Essay on the Laws of Nations*, p. 12 ; Kent, *Com. on Amer. Law*, vol. i. pp. 25, 26 ; Bynkershoek, *Quæst. Jur. Pub.*, lib. ii. cap. x. ; Heineccius, *Elementa Juris Nat. et Gent.*, lib. ii. § 231.

¹ Wheaton, *Hist. Law of Nations*, p. 546 ; Terrett et al. *v.* Taylor, 9 *Cranch's Rep.*, p. 50 ; Calvin's Case, 7 *Coke Rep.*, p. 27 ; Wildman, *Int. Law*, vol. i. p. 68.

² Kent, *Com. on Amer. Law*, vol. i. p. 26 ; Wheaton, *Elem. Int. Law*, pt. i. ch. ii. § 9, pt. iv. ch. i. § 12 ; Phillimore, *Int. Law*, vol. i. § 137 ; Zacharia, *Staats- und Bundesrecht*, § 58 ; Terrett et al. *v.* Taylor et al., 9 *Cranch*, 50 ; Kelly *v.* Harrison, 2 *Johnson's Cases*, 29 ; Jackson *v.* Dunn, 3 *Johnson's Cases*, 109 ; Calvin's Case, 7 *Coke*, 27.

each one separately, before the incorporation, belong to, and are binding upon, the new State which is created by such incorporation. But the rule must be varied or modified to suit the nature of the union formed, and the character of the act itself of incorporation, in each particular case. Thus, a distinction must be made between the mere union or confederation of States, and the creation of a new sovereignty or composite State. In the one case, the obligations would remain with the States originally separate, while in the other case they would, as a general rule, be transferred from the constituent parts to the new body politic. But if, by the act of incorporation, and by the constitution of the composite State, the rights and obligations of the component parts were to remain with the States originally separate, it could hardly be contended that the new sovereignty had either acquired the one or incurred the other. What might be claimed or incurred, under a general rule of presumptive law, could hardly be enforced against written instruments which provide especially against such claims or obligations. Nevertheless if one of these constituent parts, originally a separate State, should, by the act of incorporation, vest in the new sovereignty all its means of satisfying its debts and obligations, the new State would, even in the case of a mere federal union, be bound to assume such debts and obligations to the extent of the means so transferred.¹

¹ Florida Bonds, *Com. of Claims between U. S. and G. B.*, pp. 246 et seq. ; Holford's Case, *Com. of Claims between U. S. and G. B.*, pp. 382 et seq. ; Flassan, *Hist. de la Diplom.*, tom. iii. p. 129 ; Merlin, *Répertoire*, s.v. 'souveraineté.'

CHAPTER IV

RIGHTS OF INDEPENDENCE AND SELF-PRESERVATION

1. Independence of a sovereign State—2. Foreign interference in its internal government—3. Its right to choose its own rulers—4. Such interference in dependent and confederated States—5. Interference in virtue of treaty stipulations—6. Proffered mediation, and mediation by invitation—7. Distinction between pacific mediation and armed intervention—8. When an arbitrator may employ force—9. Interference to preserve a balance of power—10. Treaty of Paris and Congress of Vienna in 1814 and 1815—11. Attempted tripartite treaty respecting Cuba—12. Interference for self-security—13. States of the Church—14. Independence of a State in its legislation—15. In its judiciary—16. In rewarding and punishing its own subjects—17. The case of Martin Koszta—18. Right of self-preservation—19. Means incidental to general right—20. Use of these means may be limited by treaty—21. By the rights of others—22. Extraordinary increase of army and navy—23. Fortifications and military schools—24. Right of self-defence without the limits of the State.

§ 1. EVERY sovereign State may, from the very nature of its organisation, freely exercise its sovereign rights in any manner not inconsistent with the equal rights of other States. The very fact of its sovereignty implies its independence of the control of any other State. It may, therefore, exercise all rights and contract all obligations incident to its sovereignty as a separate, distinct, and independent society, or political organisation. These rights and obligations are limited only by the law of nature and the existence of similar rights in others. The international rights of sovereign States have, therefore, been divided into two classes: *absolute* and *conditional*, the former including those rights to which a State is entitled as a distinct being or sovereignty, and the latter including those rights to which it is entitled only under particular circumstances in its relation to others.¹

Independ-
ence of a
sovereign
State

¹ Wheaton, *Elem. Int. Law*, pt. ii. ch. i. § 1 ; Klüber, *Droit des Gens*, § 36 ; Vattel, *Droit des Gens*, Prélim., § 15 ; Rayneval, *Inst. du Droit Nat.*, liv. ii. ch. i. ; Bello, *Derecho Internacional*, pt. i. cap. i. § 7 ; Heffter, *Droit International*, §§ 29-31 ; Riquelme, *Derecho Internacional*, lib. i. tit. i. sec. i. cap. v. ; Ortolan, *Diplomatique de la Mer*, liv. i. ch. ii. and iii.

May
establish
its own
govern-
ment

§ 2. The right of every sovereign State to establish, alter, or abolish, its own municipal constitution and form of government, would seem to follow, as a necessary conclusion, from these premises. And from the same course of reasoning, it will be inferred, that no foreign State can interfere with the exercise of this right, no matter what political or civil institutions such sovereign State may see fit to adopt for the government of its own subjects and citizens. Vattel says that the Spaniards invaded this right when they judged the Inca of Peru, concerning the administration of his government, by their own laws. Other examples of the same nature are to be found in the invasion of Holland by Prussia in 1787, and by France in 1792; and the annihilation of the separate independence of Poland by the joint action of Russia, Prussia, and Austria in 1815. A sovereign State may freely of its own will change from a monarchy to a republic, from a republic to a limited monarchy, or to a despotism, or to a government of any imaginable shape, so long as such change is not of a character to immediately, or of necessity, affect the independence, freedom, and security of others.¹

Choice of
its own
rulers

§ 3. The right of a sovereign State to the choice of its own rulers rests upon the same foundation as its right to determine the form of its own internal constitution; and the interference of a foreign State in the one case cannot be justified except under the same circumstances and upon the same grounds as in the other, viz., *the immediate and pressing danger to its own independence and security*. In other words, the change must involve *external* as well as *internal* relations, in order to render foreign interference in such case justifiable, even under the most liberal and extended rules of construction. Moreover, even in the case supposed, if the danger is only remote and problematical, it would fail to make the interference justifiable in the eye of international law.²

Interfer-
ence in
dependent
States

§ 4. No writer of authority, on international law, advocates any general right of one sovereign and independent State to interfere with the domestic concerns and internal

¹ Wildman, *Int. Law*, vol. i. pp. 47, 68; Phillimore, *Int. Law*, vol. i. § 148; Martens, *Précis du Droit des Gens*, § 78; Grotius, *De Jur. Belli*, lib. ii. ch. ix. § 8; Bynkershoek, *Quæst. Jur. Pub.*, lib. ii. ch. xxi. § 1; Vattel, *Droit des Gens*, bk. ii. ch. iv.

² Kent, *Com. on Amer. Law*, vol. i. p. 21; Phillimore, *Int. Law*, vol. i. §§ 389, 390; Vattel, *Droit des Gens*, Prélim. §§ 22, liv. i. ch. v. §§ 66, 67.

government of another sovereign and independent State. Some writers make numerous exceptions to the general rule of non-interference, and attempt to justify interference by one State, in the internal affairs of another, in particular cases and for certain specified objects. The principal grounds upon which such interference has been justified are : first, self-defence ; second, the obligations of treaty stipulations ; third, humanity ; and fourth, the invitation of the contending parties in a civil war. We will here examine each of these grounds, with respect to pacific interference, reserving for another place a discussion of how far they will justify a resort to force or a war of intervention.¹

§ 5. Foreign interference, in the *internal* affairs of a State, has sometimes been defended on the ground of a necessity on the part of the interfering States, involving their own particular security. That a right of pacific interference, and even of armed intervention, may sometimes grow out of such threatened danger to a particular State, cannot be doubted. In the opinion of Mr. Canning, interference is justifiable with a nation which attempts to ‘ propagate, first, her principles, and, afterwards, her dominion, by the sword, or encourages the subjects of another to resist authority, or assist rebellious projects.’ So, also, there may be an impending danger, affecting the general security of nations, which may justify an interference on their part, for the security of their own independence and the preservation of peace. But such danger must be threatening and immediate, and not a mere remote contingency ; and even then the interference must be limited to the removal of the danger itself ; beyond that it would be unlawful.²

The interference of a confederation in the affairs of its own confederate States, may either be looked upon as an exception to the rule of non-interference, or as a sovereign body regulating the affairs of an individual member. The Schleswig-Holstein difficulty of 1863 is an example of such interference.³

¹ *Vide post.*, ch. xvi. ; Phillimore, *Int. Law*, vol. i. § 400 ; Wenck, *Codex Juris Gent.*, t. i.

² Heffter, *Droit International*, §§ 44, 46 ; Manning, *Law of Nations*, pp. 97, 98.

³ *The Relations of the Duchies of Schleswig and Holstein to the Crown of Denmark and the Germanic Confederation*, 1848, by Sir Travers

This
usually is
a mere
excuse

§ 6. But this impending or contingent danger to the general peace of nations, or to the independence of particular States, is more frequently appealed to as an *excuse*, than as a *justifiable reason*, for foreign interference in the internal affairs of others. And instead of preserving peace, such unlawful interference has frequently been the cause of wars the most cruel and bloody that have ever stained the annals of history. We scarcely need refer to the wars which resulted from foreign interference in the internal affairs of France in the revolution of 1789, in proof of our assertion. Unfortunately historians and jurisconsults are too apt to draw their arguments from the *fact* to the *right*, and to infer the right of interference from the numerous examples of its actual exercise, without testing the legality of the usage by reference to fundamental principles. If foreign interference in the internal affairs of a sovereign State (except in cases of imminent and actual danger to the general or particular security, freedom, and independence of nations) is contrary to natural law, as the fundamental principle of international jurisprudence, usage and custom cannot make it justifiable or lawful, for no length of usage can justify a wrong.¹

Chateau-
briand's
views

§ 7. That the general rule of natural law is opposed to all interference in the internal affairs of another State, cannot be doubted. It is confirmed by reason, and the concurring opinions of the most eminent publicists of all ages and all nations. It must nevertheless be admitted that there are exceptions to this rule. The principal difficulty is in confining the exceptions so as not to infringe upon the principle of the rule. The general rule, and the possible exception to it, were both very clearly stated by M. de Chateaubriand in his speech in the French Chamber on the Spanish war of 1823. 'Has,' said he, 'a Government of one country a right to interfere in the affairs of another? This great question of international law has been resolved in different ways, by different writers on the subject. Those who incline to Twiss, contains much valuable information on questions which arose at that date, and which are involved in the latter phase of the controversy.

¹ Wheaton, *Hist. Law of Nations*, pp. 80, 88; Vattel, *Droit des Gens*, liv. ii. ch. i. § 7; Bynkershoek, *De Foro Legatorum*, cap. ii. § 4; Bynkershoek, *Quæst. Jur. Pub.*, lib. i. cap. xxv.; *Edinburgh Review*, No. 156, p. 329; Le Louis, 2 *Dod R.*, 257. See speech of Lord Palmerston, *Parl. Deb.*, xxviii. p. 1163, and Mr. Canning's *Despatch*, Mar. 31, 1823, *Ann. Reg.*, 1823, *Pub. Doc.*, 140.

the natural right, such as Bacon, Puffendorf, Grotius, and all the ancients, mention that it is lawful to take up arms in the name of the human race against a society which violates the principles on which the social order reposes, on the same ground on which, in particular States, you punish an individual malefactor who disturbs the public repose. Those who consider the question as one depending on civil right, are of opinion that no one Government has a right to interfere in the affairs of another. I adopt, in the abstract, the principles of the last. I maintain that no Government has a right to interfere in the affairs of another Government. In truth, if this principle is not admitted, and above all by all people who enjoy a free constitution, no nation could be in security. It would always be possible for the corruption of a minister or the ambition of a king to attack a State which attempted to ameliorate its condition. In many cases wars would be multiplied ; you would adopt a principle of eternal hostility—a principle of which every one would constitute himself judge, since every one might say to his neighbour, “Your institutions displease me ; change them, or I declare war.”

‘But when the modern political writers rejected the right of intervention, by taking it out of the category of natural to place it in that of civil rights, they felt themselves very much embarrassed at the result ; for they saw that cases will occur in which it is impossible to abstain from intervention without putting the State in danger. At the commencement of the revolution, it was said, “Perish the colonies rather than one principle,” and the colonies perished. Shall we also say, “Perish the social order rather than sacrifice a principle ;” and let the social order perish ? In order to avoid being shattered against a principle which they themselves had established, the modern jurists have introduced an exception. They said, no Government has a right to interfere in the affairs of another Government, *except in the case where the security and immediate interests of the first Government are compromised.*’¹

¹ De Cussy, *Précis Historique*, ch. iv. ; Phillimore, *Int. Law*, vol. i. §§ 390 et seq. ; Alison, *Hist. of Europe*, ch. xii. §§ 41 et seq. ; *Moniteur*, Feb. 15, 1823, and compare Mons. De Chateaubriand’s despatch to Mr. Canning, Jan. 23, 1823, and the answer of Mr. Canning ; *Annuaire Historique* (Lesur), 1823, p. 708 ; *Ann. Reg.*, 1823, *Pub. Doc.*, 110. The

Under
treaty
stpu-
lations

§ 8. Another ground of foreign interference in the internal affairs of a sovereign State, advocated by some text-writers,

emancipation of Greece by the arms of Great Britain, France, and Russia, in 1827, from the Government of Turkey is difficult to justify on the ground of International Law. 'The emancipation of Greece,' says Sir William Harcourt, 'was a high act of policy above and beyond the domain of law. As an act of policy it may have been and was justifiable ; but it was not the less a hostile act, which, had she dared, Turkey might properly have resented by war.' (*Letters of Historicus*, p. 6.) It should be observed that Greece had revolted against her lawful ruler, and that the power and authority of that ruler had never fallen into abeyance, nor been subdued or overcome by the insurgents ; but it may be argued in favour of the intervention of the three Powers, and on which indeed the same was based, that humanity demanded their interference to stay further bloodshed, that the state of piracy which prevailed endangered the commerce of neutrals, and that the anarchy was such that Turkey was unable to repress it. Another ground on which the intervention was based was that it was by request of Greece. (*Parl. Debates*, second series, xv., xviii., xix., xxii., xxv. ; *British and Foreign State Papers*, 1816-30, xiv. p. 629-xvii. p. 191.)

The revolution of 1820 in Spain and in Naples called forth a circular despatch from Austria, Prussia, and Russia (the result of the Congress of Troppau and of Laybach), proclaiming their intention to oppose revolution and change of government in Europe. This was based on the principles enunciated in the Congress of Aix-la-Chapelle, 1818, when the five great European Powers, who became parties to the political system established in 1815, engaged 'to be observant of the great principles they profess to recognise as the foundation of this compact, in the various conferences which may from time to time be held, either between themselves or their respective ministers, whether the conference in question be devoted to a common deliberation upon their own affairs, or whether they concern matters in which other Governments shall have formally requested their mediation. The same disposition which is to guide their own deliberations and govern their own diplomatic transactions shall also preside at these conferences, and have for its constant object the general peace and tranquillity of the world.'

In reply to the above circular despatch, the British Government in 1821 declared that no Government was more prepared than their own 'to uphold the right of any State or States to interfere where their own security or essential interests were seriously endangered by the internal transactions of another State. That the assumption of the right was only to be justified by the strongest necessity, and to be limited and regulated thereby ; that it could not receive a general and indiscriminate application to all revolutionary movements without reference to their immediate bearing upon some particular State or States ; that its exercise was an exception to the general principles of the greatest value and importance, and as one that only properly grows out of the circumstances of the special case ; and exceptions of this description could never without the utmost danger be so far reduced to rule as to be incorporated into the ordinary diplomacy of States, or into the institutes of the Law of Nations ; and the British Government adhered to the same principles at the Congress of Verona the following year, declaring that so long as the Spanish revolution was maintained within the Spanish dominions, there could be no justification for a foreign interference. After perusal of the above it is not apparent on what principle of international law Great Britain in 1840, in unison with Austria, Prussia, and Russia, assisted the Sultan Abdul Medjid to reduce Mehemet Ali, the Pasha of Egypt, to

is the obligations of treaty stipulations. There can be no doubt that a sovereign State may guarantee a particular form of government to one of its component parts, as the constitution of the United States of America guarantees a *republican* form to each State of the federal union ; or, in case of a protectorate, the protecting State may guarantee or direct a particular form of government for the dependent or protected State. But neither the component nor the protected States are in these cases to be regarded as independent sovereignties ; they have parted with some of the essential qualities of sovereignty and independence, and, consequently, are not entitled to the full rights incident to their primary condition as equal members of the society of nations. The same doctrine may apply generally to treaties of unequal alliance. But, in treaties of equal alliance, between independent and sovereign States, will a stipulation of mediation or guaranty justify generally the interference of one State in the internal affairs of another, contrary to the wishes of the latter ? If the interference is in itself unlawful, can any previously existing stipulation make it lawful ? We think not ; for the reason that a contract against public morals has no binding force, and there is more merit in its breach than in its fulfilment. In 1834 Lord Mahon drew attention in the House of Commons to the assistance given to Spain by Great Britain in putting down the Carlist insurrection in Navarre. Although the moral effect of the Quadruple Alliance had assisted to restore peace to Portugal, the character of Great Britain as regarded Spain was different ; it was no longer a question of succession to a throne, but of an insurrection. He therefore questioned the legality of further British interference in Spain, moreover remarking that even if interference could be justi-

obedience, and to interfere in the domestic concerns of a foreign State. France, indeed, refused to take coercive measures against the Pasha. 'If,' said the late M. Thiers, 'the proposals to curtail the power of Mehemet Ali and to divide Syria are persisted in, I shall advise my country not indeed to come to a rupture, but to retire within herself and await the course of events.' The reasons which led to this interference on the part of Great Britain are worthy of the attention of the student, for although, as before suggested, it is difficult to explain the mere facts on the grounds of law, it cannot be doubted but that they were based on a sound policy, owing to the secret Russian intrigues then at work, of which the British Ministry was cognisant.—*British and Foreign State Papers*, vol. viii. p. 1128 ; *Ann. Reg.*, 1823, *Pub. Doc.*, 93 et seq. ; *Ann. Reg.*, 1840, 162.

fied, it should be by regular British troops, and not, as was the case, by a body of mercenaries, to facilitate whose enrolment the British Foreign Enlistment Act had been purposely suspended. Sir Robert Peel also blamed the policy of England, and after having mentioned that it was the first instance in modern times of intervention by that country in the domestic affairs of a foreign country, disclaimed the right of interference even if for the purpose of insuring permanent benefit to England. 'The general rule,' continued he, 'on which England has hitherto acted is non-intervention, the only admissible exception to it being cases where the necessity is urgent and immediate, affecting, either on account of vicinage or some special circumstances, the safety and vital interests of the State ; to interfere on the vague ground that British interests would be promoted by intervention, or the plea that it would be for our advantage to re-establish a particular form of government in a country circumstanced as Spain was, is to destroy altogether the general rule of nonintervention, and to place the independence of every weak Power at the mercy of a formidable neighbour.' Lord Palmerston, on the other hand, objected that it was not an interference on the part of Great Britain, but merely a permission to Englishmen to assist the Queen of Spain, and added that the interference of the Quadruple Alliance was by virtue of a treaty. 'In the case of a civil war,' said he, 'proceeding either from a disputed succession or from a long revolt, no writer on international law denies that other countries have a right, if they choose to exercise it, to take part with either of the two belligerents. Undoubtedly it is inexpedient to exercise that right except under circumstances of a peculiar nature. The right, however, is general ; if one country exercises it, another may : the present measure establishes no new principle, and creates no new danger as a precedent.' In 1847, on the refusal of the insurgents in Portugal to accede to such terms as might be advised by Great Britain, France, and Spain, a British squadron, with the concurrence of the Queen of Portugal, was sent to Oporto, and the insurrection by that means was terminated. Lord Palmerston defended this interference on the ground of the necessity of existing facts, particularly the recall of the Portuguese Parliament, and on

the claims which Portugal, the old natural ally of Great Britain, had on that country.¹

§ 9. Another ground of foreign interference, in the internal affairs of a sovereign State, is that of *humanity*, it being done On the
plea of
humanity for the alleged purpose of stopping the effusion of blood caused by a protracted and desolating civil war in the bosom of the State so interfered with. If such interference be in the nature of a pacific mediation, one State merely proposing its good offices for the settlement of the intestine dissensions of another State, there can be no doubt of its lawfulness. How far interference by *force*, or an armed intervention in the internal affairs of another State, may be justified on the ground of humanity, will be considered in Chapter XVI. In 1860 the British Government refused to acquiesce in the suggestion of France that they should jointly prevent Garibaldi from crossing into the Neapolitan territory, and pointed out that it was for the Neapolitans to say if they would receive him or not, and that an armed intervention to stop the expedition of Garibaldi would contradict the principle which Great Britain had long professed 'of not interfering in the internal concerns of foreign countries.' The Sardinian Government interfered, nevertheless, but on the side of the insurgents, with the declaration of a desire 'to maintain order and to wish to make the will of the people respected.' The same year the inhabitants of Umbria and the Marches threw off the Papal Government, and proclaimed Victor Emmanuel their king. On the insurgents being attacked by the Papal troops under General Lamoricière, the Piedmontese troops threatened to occupy those provinces 'if the Papal troops attempted to repress by force any manifestation of the inhabitants in the national sense,' and Count Cavour, in a communication to Cardinal Antonelli, of September 7, 1860, declared that Sardinia would invade the Papal States unless the Pope disbanded his foreign legions. In consequence of the refusal of the Papal Government to accede to such a proposal, Sardinia intervened with an armed force, on the ground of the dangers to which northern Italy was exposed owing to the state of affairs on the Papal territory, of the desire of the inhabitants for a change of government, of the obligations on Sardinia, and on Europe

¹ *Parl. Deb.*, xxviii. 1133-63; *Brit. and Foreign State Papers*, 1846-47, vol. xxxv. p. 1110.

respectively, to influence the national movements to repress disorder. This was followed by the annexation of the territory to Sardinia. These proceedings were strongly disapproved of by several of the principal Courts of Europe. France and Russia withdrew their Ministers from Turin; Prussia and Austria conveyed the sense of their displeasure to the same. Great Britain, however, could see no sufficient ground for the severe censure with which those States visited the acts of the King of Sardinia. 'Did the people of Naples and of the Roman States take up arms against their Governments for good reasons? Upon this grave matter,' Lord John Russell (writing to Sir J. Hudson, October 27, 1860) said, 'Her Majesty's Government hold that the people in question are themselves the best judges of their own affairs. I therefore cannot blame the King of Sardinia for assisting them.'¹

By invitation
of con-
tending
factions

§ 10. Again, suppose such interference in the internal affairs of another State be made on the invitation of the contending parties in the civil war? If the invitation be from only one of the contestants, it can, by itself, confer no rights whatever as against the other party. But if both parties unite in the invitation, it will afford just grounds for the interference of the mediating Power. How far such invitations will justify an armed intervention between the contending parties, will be discussed in chapter xvi. It is sufficient to remark in this place, that the opinion or decision of a mediating Power, whether the mediation be proffered or invited, is of the nature of advice, or rather of a proposition for an amicable adjustment of existing differences; which proposition may be rejected by one or both of the parties, without just offence to the mediator.²

Arbitra-
tion be-
tween
parties in
a civil
war

§ 11. But if such proffered or invited mediation is of the nature of an arbitration, in which the question of difference is submitted to the decision of the mediating Power as an *arbitrator*, with an agreement to abide by such decision, neither party can properly refuse to abide by the result of the reference, unless it be shown that the award has been made in collusion with one of the parties, or that it exceeds the terms of the submission. The general rules governing

¹ See chap. xvi. § 21; *Parl. Papers*, 1860.

² Kent, *Com. on Amer. Law*, vol. i. p. 25; Phillimore, *Int. Law*, vol. i. § 395; Martens, *Précis du Droit des Gens*, §§ 176, 327, 330.

such arbitrations are the same as those governing arbitrations between sovereign and independent States, which will be discussed in another chapter.¹

§ 12. But suppose the award has been made without collusion, and has been confined to the terms of the submission, and that one of the parties should refuse to abide by the decision, although both agreed to do so, will such refusal justify the mediating Power in employing force to compel obedience to its decision? To decide this question, it will be necessary to inquire into the particular circumstance of each case. The arbitrator's right to use force, in order to carry his decision into effect, if it exist at all, must be deduced from the terms of the agreement, entered into by the contracting parties to the submission. It does not result as a necessary consequence of his undertaking the office of arbitrator. But this question will be more particularly discussed under the head of *wars of intervention*; we are here considering only the general right of pacific interference, or pacific mediation, in the internal affairs of a State.²

§ 13. There are certain cases where the very character of the constitution or government of one State may authorise the interference of another in the choice of its rulers. Such cases, however, are mainly confined to semi-sovereign or dependent States. But the States of the Church had usually been regarded, in the international law of Europe, as sovereign and independent. Nevertheless, by virtue of a right, the origin of which is not well known, possessed by Austria, France, and Spain, and claimed by, although not conceded to, Portugal, the above Powers have a power of *excluding from*, but not of *electing to*, the Papacy. This right may have arisen through circumstances connected with the fact that for many centuries, until the year 1870, the Pope, in addition to being the supreme Pontiff of the Roman Catholic Church, was also a temporal sovereign. As these spiritual and temporal offices are now separated, the right of foreign States to interfere in the choice of the person to fill the office of *civil* ruler might well be questioned; but from the use of the words

Right of
arbitrator
to enforce
his
decision

Interfer-
ence in
cases of
dependent
States

States
of the
Church

¹ *Vide post.*, ch. xiv. § 7; Wheaton, *Elem. Int. Law*, pt. ii. ch. i. § 13; Gardien, *De la Diplomatie*, tom. i. p. 436; Rayneval, *Droit de la Nat. et des Gens*, liv. iii. ch. xxii.

² *Vide post.*, ch. xiv. § 12.

"Supreme Pontiff," in the form of exclusion, it would appear, although not conclusively, that it is only a right of interference in the election of a person to a spiritual office.¹

In cases
of con-
federated
States

In the case of a composite State, or a confederation of several States, the right of one State to interfere in the affairs

¹ Before the election of Leo XII., the Sardinian Ambassador at Rome, writing, in 1823, to the Minister of Foreign Affairs at Turin, relative to the Conclave, says: 'L'influence que les Cours ont dans l'élection du Pape se réduit essentiellement au droit d'exclusion, droit qui n'est fondé que sur une consuetude dont l'origine n'est pas bien connue.'

In 1823 the King of Naples, in his instructions to Cardinal Ruffo relative to the Conclave, says: 'The right does not appertain to the Crown of the Kingdom of the Two Sicilies of *express exclusion*, since it is only reserved to the Courts of France, Spain, and Austria: we trust to your ability, that you will employ all the means which your talents suggest to you, to make the *tacit exclusion* prevail.'

The following is the form of exclusion made use of by Cardinal Albani, on behalf of Austria, against the election of Cardinal Severoli:—'September 21, 1823:—In my capacity of Ambassador Extraordinary to the Sacred College assembled in Conclave, which capacity has been signified to, and known by, Your Eminences as much by means of the letter which has been addressed to you by His Imperial Majesty, as by the notification which to Your Eminences has been made by His Imperial Ambassador, and by virtue of the instructions which have been given to me, I fulfil the displeasing duty of declaring that the Imperial Court of Vienna cannot accept for Supreme Pontiff His Eminence Cardinal Severoli, and gives to him a formal exclusion (*esclusiva*).'—Bianchi, *Storia della Dipl. Europ. in Ital.*, vol. ii.

In 1831 Cardinal Giustiniani was excluded by Spain. (*Memorie dei Conclavi da Pio VII. a Pio IX.*, Cipoletta, Milano, 1863.)

Instructions of the French King, Charles X., to the French Cardinals going to the Conclave in 1829: '... Elle n'a point, à proprement parler, de plan formé pour élever sur la chaire pontificale, ou pour en exclure, tel ou tel membre du Sacré Collège. Elle regretterait même d'avoir à donner une exclusion formelle et authentique; mais ce n'est pas moins un cas à prévoir; et cette nécessité se présenterait si la majorité des voix menaçait de se déclarer en faveur d'un sujet dont les préjugés personnels, un zèle aveugle, un caractère intolérant et inquiet, et surtout l'habitude de dépendre de telle ou telle grande puissance seraient susceptibles de faire pressentir à l'Eglise une administration dangereuse aux Gouvernements étrangers, et à la France en particulier des complications et des embarras de plus d'un genre. ...'

It does not appear necessary that a Pope be selected either from the ranks of the Cardinals, or that he be in Orders. At the election of a new Pope, in 1758, votes were given in favour of Father Baberini, General of the Capuchins, who was not a Cardinal. (Novaes, *Storia dei Pont.*, vol. xiv. 8.) Moroni (vol. xxxi.) distinctly states that John XIX. was only a lay brother when elected.

The usual observance has been not to proceed with a ballot for a new election until the tenth day after the decease of the former Pope, but this custom could evidently be set aside in case of urgency or necessity.

Particulars concerning the mode of the election of a Pope may be found in the 3rd and 26th chapters *De Elect.* in the Sixte; the 2nd chapter *De Elect.* in the Clementines; and the Decretals, lib. i. tit. 6, cap. 6. See also concerning the status of the Pope, *infra*, ch. v. § 5, and ch. viii. § 31.

of another, or of the supreme Government to interfere with that of one of its constituents, will depend upon the constitution or plan of confederation ; it does not result from any general right in sovereign States, as recognised by international law.¹

§ 14. Another incident to the sovereignty of a State is its independence of every other in its legislative power, so far as such independence does not conflict with the sovereign rights of other States, and is not limited or modified by acts of union or the stipulations of treaty. There is, however, properly speaking, no conflict in laws relating to international jurisprudence, so long as each sovereign State confines its legislation within its own proper and legitimate limits, that is, to the regulation of the rights and duties of its own subjects, *inter se*, and in their relations to their own government. But in what is erroneously called *private* international law, which regulates the rights of individuals of one State with respect to the laws and institutions of other States, there is not unfrequently a *conflict of laws*. A consideration of this subject belongs to chapter vii.²

Independence in legislation and courts

§ 15. So, also, every sovereign State is independent of every other in the exercise of its judicial power, which, subject to the exceptions already mentioned, is co-extensive with its legislative power. At the same time, this power does not embrace cases where the municipal institutions of another nation operate within its territory, as in cases of a public minister, a foreign fleet or army, rights of extritoriality conceded by treaty, &c. But these questions will be more particularly discussed hereafter.³

Only within its own territory

It has frequently been laid down that a nation is bound to support the claims of her subjects who are unsatisfied creditors, or bondholders of other States. Governments as a rule object to assist their subjects in obtaining redress from

Foreign bonds

¹ Mayer, *Corpus Juris Germ.*, lib. ii. p. 196 ; Martens, *Précis du Droit des Gens*, § 76 ; Garden, *De la Diplomatie*, tom. i. pt. iii. § 6 ; *Acte Final du Congrès de Vienne*, art. 74 ; *Constitution of the United States*, art. 3.

² *Vide post.*, ch. vii. §§ 1 et seq. ; Wheaton, *Elem. Int. Law*, pt. ii. ch. ii. § 1 ; Foelix, *Droit International Privé*, § 3 ; Rayneval, *Droit de la Nat. &c.*, liv. i. ch. xi. ; Riquelme, *Derecho Pub. Int.*, lib. ii. tit. i. cap. i.

³ Bynkershoek, *De Foro Legat.*, cap. iii. ; Casaregis, *Discursus Leg.*, pp. 136, 174 ; The Exchange *v.* McFaden, 7 ; Cranch, 135 ; Garden, *De la Diplomatie*, tom. i. pt. iii. § 7 ; Bello, *Derecho Internucional*, pt. i. cap. iv. § 4 ; Rayneval, *Droit de la Nat. &c.*, liv. i. ch. xi. ; and see ch. x. § 13.

foreign States in the matter of government loans, although they frequently support the complaints of subjects who have suffered from foreign governments in other ways. In principle there is no difference between the two classes of wrongs ; and, as Sir Robert Phillimore expresses it, 'the right of interference on the part of a State for the purpose of enforcing the performance of justice to its citizens from a foreign State stands upon an unquestionable foundation when the foreign State has become itself the debtor of these citizens.' The only question for the consideration of a government is whether it will enforce this right or not. The late Lord Palmerston distinctly laid it down in 1848 in a circular letter to British representatives abroad that 'there can be no doubt whatever of the perfect right, which the government of every country possesses, to take up as a matter of diplomatic negotiation any well-founded complaint which any of its subjects may prefer against the government of another country, or any wrong which from such foreign government those subjects may have sustained . . . the British Government has considered that the losses of imprudent men, who have placed mistaken confidence in the good faith of foreign governments, would prove a salutary warning to others, and would prevent any other foreign loans from being raised in Great Britain except by governments of known good faith and of ascertained solvency. But, nevertheless, it might happen that the loss occasioned to British subjects, by the non-payment of interest upon loans, made by them to foreign governments, might become so great that it would be too high a price for the nation to pay for such a warning as to the future ; and in such a state of things it might become the duty of the British Government to make these matters the subject of diplomatic negotiation.' The right, therefore, of a government to protect its subjects in all cases of dishonesty or insolvency of foreign governments is well recognised by Great Britain ; but it is to be regretted that her internal policy has prevented her from exercising it in more recent years. Certainly there never was a time in the history of this country when more fraud and dishonesty has been perpetrated by foreign governments, especially on the American Continent ; and the mere pretext of insufficient assets with which to meet liabilities should not be freely accepted by creditors ; for an impoverished State

frequently has huge natural resources, unexplored or uncultivated, which, by a State really desirous of observing the common rules of honesty, might be utilised for the benefit of its creditors, granted to them for long terms, or absolutely conceded to them.

In 1847, on the occasion of a motion in the House of Commons to obtain redress by force of arms against the Spanish Government on account of the debts due by it to British holders of unpaid Spanish bonds of the amounts of 46,000,000*l.*, Lord Palmerston, then Secretary for Foreign Affairs, while entreating the House not to impose upon his Government the obligations which the proposal would throw on it, distinctly warned foreign Governments that, if they did not make proper efforts to fulfil their engagements, his Government might be compelled to depart from the established practice of Great Britain, and to insist upon the payment of national debts. He pointed out that Great Britain had the means of enforcing the rights of British subjects, and would not for ever remain patient under such wrong. In 1840 the British Government commenced hostilities against the kingdom of Naples for an infraction by that Government of the stipulations of the treaty of 1816. The Neapolitan Government had granted a monopoly of all the sulphur produced and worked in Sicily to a private firm. This had caused a decline in the British trade in sulphur to the amount of 35,000*l.* per annum ; but the firm determination of Great Britain caused the dissolution of the monopoly. Again, in the same year, the British Government informed the Government of Portugal that, unless a convention for the settlement of the claims of the British Legion and of the British Auxiliary Force in Portugal was returned, ratified within a fortnight, it would proceed to take such steps as might appear to it to be proper for the purpose of obtaining redress. The Portuguese Government were thus constrained, and conceded the just claims of the parties and paid interest as well as principal. In 1850 the British Government interfered on behalf of one Pacifico, a Jew, but born a British subject, whose property had been destroyed by a mob in Greece, and authorised reprisals against that Government until compensation was awarded to the claimant. Russia remonstrated with Great Britain for this act, but it met with the approval of

France. In 1861 a convention was entered into between Great Britain, France, and Spain, for the purpose of obtaining payment from the Mexican Government of debts of large amount due from that Government to British subjects, as also to enforce the smaller claims of the other parties to the convention. But Great Britain and Spain withdrew from joint action with France in 1862, having accomplished the objects which were originally stipulated, leaving the latter Power to pursue a further course alone.

These are but a few examples of occasions when the policy of Great Britain has permitted her to enforce a well-recognised international right.

In some States income-tax is levied *inter alia* on income arising out of dividends in the Public Funds. Although this may be just as against persons residing in that State, it is an injustice to levy it on persons holding bonds of that State, but not being subjects of that State and living abroad. Persons in this position often have to pay a double income-tax; first to the foreign government whose bonds they hold, and secondly to their own government at home. This is the case with those persons in England who hold bonds of the Austrian or Italian Governments. The practice of Great Britain, on the other hand, has been not to tax government interest transmitted abroad.

**Law of
Liquid-
ation of
Egypt**

In consequence of the insolvency of Egypt at the abdication of Ismail Pasha in 1879, the late Khedive (Mehemet Tewfik) requested Great Britain and France each to appoint a Controller-General to investigate the administration of the Public Debt of Egypt, and to reform it. This was done by drawing a distinct line of demarcation between the past and the future, and by deciding on a new law by which all claims prior to the promulgation of the same should be finally liquidated. This line was drawn on December 31, 1879. On March 31 following a Collective Declaration was signed by Great Britain, Germany, Austro-Hungary, France, and Italy by which the high contracting parties engaged to recognise the decisions of the Commission of Liquidation as binding, and to obtain the adherence to this Declaration of the other Powers who took part in the establishment of the mixed or reformed tribunals in Egypt. The Law of Liquidation was therefore prepared by this Commission, and was

published by it in the name of the Khedive on July 17, 1880. There is no appeal from it, notwithstanding any enactments of the 'Organisation Judiciaire' or of the Reformed Codes. The following Governments have since adhered to it—viz. Belgium, Spain, the Netherlands, Sweden and Norway, Denmark, Portugal, Greece, the United States, and Russia. The benefits which resulted from this interference of Great Britain in the internal affairs of Egypt cannot be too highly extolled. A bankrupt and misgoverned country has been wisely and carefully controlled; it is now more than able to pay all the interest on its public loans or bonds, and the same are doubled in value for all financial purposes.

§ 16. Every sovereign State being independent of all others in the exercise of its legislative and judicial powers, it follows as a necessary consequence that it is also (save in the case of piracy, which is justiciable everywhere) independent of all others in the rewards and punishments of its own subjects. It may make its own laws defining offences, organise its own tribunals for trying them, and for awarding punishments to its own subjects, and it may inflict its punishments upon its own subjects found in its own vessels upon the high seas, or within its own territorial jurisdiction. Moreover, its laws and penalties follow its citizens into all places and all countries; but it can neither arrest nor punish them within the territorial jurisdiction of a foreign State, except where such a right is conceded by treaty stipulations.¹

In re-
wards and
punish-
ments

§ 17. The case of Martin Koszta, in 1853, and the discussions resulting from his seizure and forcible release, have given to the foregoing rule of international law a prominent position in the public mind. Koszta, a Hungarian banished from the Austrian dominions for political offences, had acquired a domicile and taken the preliminary steps to naturalisation in the United States. While thus partly clothed with the national character of the United States, his business called him to the Turkish port of Smyrna, where, whilst holding a travelling pass from the United States Consul, he was seized by Austrian agents and confined in an Austrian vessel of war, the 'Husza,' preparatory to transportation to the Austrian port of Trieste. The Turkish authorities not only disavowed

Case of
Martin
Koszta

¹ Huberus, *Prælect.*, tom. ii. liv. i. tit. iii.; Rose v. Himely, 4 Cranch, 278. See ch. vii. § 28 on the extradition of criminals.

this act of Austrian officials, but protested against their conduct as in violation of Turkish sovereignty. Under these circumstances, the captain of the United States vessel of war the 'St. Louis' demanded and enforced Koszta's release from the Austrian vessel. Austria not only demanded a disavowal by the United States of the acts of the American agents, and satisfaction for what she deemed an offence to her own flag, but also sent a circular to other European Courts, complaining of the rescue of Koszta as a violation of international law. All these allegations were most clearly and satisfactorily disproved in the masterly despatch of Mr. Marcy, the American Secretary of State, to the Austrian Chargé d'Affaires, in which it was shown that Austria had been the real aggressor, and that the United States had made no intentional encroachment upon the sovereign territorial rights of Turkey. Had that Power been able to protect the integrity of her soil from Austrian encroachment, in the seizure of a person partly clothed with American nationality, there would have been no occasion for the interposition of American authority for the protection of that person. But in her own inability to protect the rights of Americans against Austrian aggression, she assented to and approved the acts of the American agents in doing so themselves ; and certainly, if she was satisfied, others had no right to complain in the matter, which in no way affected them. Baron de Cussy, in reviewing this transaction, has not duly considered this point, nor indeed has he correctly and fully stated the true facts and circumstances of the case. In answer to the charge of a violation of international law by the United States, with respect to Turkey, Mr. Marcy said : ' Before closing this communication, the undersigned will briefly notice the complaint of Austria against Captain Ingraham, for violating the neutral soil of the Ottoman Empire. The right of Austria to call the United States to an account for the acts of their agents, affecting the sovereign territorial rights of Turkey, is not perceived, and they do not acknowledge her right to require any explanation. If anything was done at Smyrna in derogation of the sovereignty of Turkey, this Government will give satisfactory explanation to the Sultan when he shall demand it, and it has instructed its minister resident to make this known to him. He is the judge, and the only rightful judge, in this affair, and the injured

party too. He has investigated its merits, pronounced judgment against Austria, and acquitted the United States ; yet, strange as it is, Austria has called the United States to an account for violating the sovereign territorial rights of the Emperor of Turkey.' In the end Koszta was brought back to the United States, with the reservation of the right to Austria to proceed against him if he should return to Turkey. In 1854 Mr. Marcy wrote to Mr. Jackson, Chargé d'Affaires at Vienna, respecting one Simon Tousig, who had been arrested by the Austrian Government for acts he had committed in violation of the Austrian laws while an Austrian subject: ' I have carefully examined your despatches relating to the case of Simon Tousig, and regret to find that it is one which will not authorise a more effective interference than that which you have already made in his behalf. It is true he left his country with a passport issued from this Department, but, as he was neither a native-born nor naturalised citizen, he was not entitled to it. It is only to citizens that passports are issued. Assuming all that could possibly belong to Tousig's case—that he had a domicile here and was actually clothed with the nationality of the United States—there is a feature in it which distinguishes it from that of Koszta. Tousig voluntarily returned to Austria, and placed himself within the reach of her municipal laws. He went by his free act under their jurisdiction, and thereby subjected himself to them.' ¹

Case of
Simon
Tousig

§ 18. Another right immediately resulting from the independence of sovereign States, is that of *self-preservation*. This is one of the most essential and important rights incident to State sovereignty, and lies at the foundation of all the rest. It is not only a *right* with respect to other States, but a *duty* with respect to its own members, and one of the most solemn and important duties which it owes to them. ' The right of self-preservation,' says Phillimore, ' is the first law of nations as it is of individuals. A society which is not in a condition to repel aggression from without, is wanting in its principal duty to the members of which it is composed, and to the chief end of its institution.'

Right of
self-pre-
servation

¹ *Marcy to Hülsemann*, Sept. 26, 1853; *Cong. Doc.*, 33rd Cong. 1st sess.; Senate *Ex. Doc.* No. 1; Lawrence's Wheaton, *Elem. Int. Law*, pt. ii. ch. ii. § 12 and Appendix, 929.

Means
incident
to this
right

§ 19. This right of self-preservation necessarily involves all other incidental rights which are essential as means to give effect to the principal end. And other nations have no right to prescribe what these means shall be, or to require any account or explanation of the conduct of a sovereign State in this respect, except so far as their own peace and safety may be affected or threatened. The means usually resorted to for this purpose are the construction of fortifications, the organisation of military and naval forces, and the contraction of alliances with other States. 'The full liberty of a nation in this respect,' says Phillimore, 'cannot, as a general principle of international law, be too boldly announced or too firmly maintained.'¹

May be
limited by
treaty

§ 20. But the exercise of these incidental rights may be modified or controlled by special compacts freely entered into with other States. Thus, by the treaties of 1748 and 1763, France engaged to demolish the fortifications of Dunkirk, and this stipulation, so humiliating to the French nation, was not effaced till the treaty of 1783. Again, by the treaty of 1815, France engaged to demolish the fortifications of Huningen, and never to renew them nor to replace them by other fortifications within three leagues of the city of Bâle. By the treaty of 1856, between Russia, Turkey, and the Allies, the former stipulated to relinquish her right to construct military-marine arsenals, and to maintain a naval force in the Black Sea. The provisions of this treaty, however, were very considerably modified by the Conference of London, 1871, and vessels of war of friendly Powers may now be admitted by the Sultan in time of peace to secure the execution of the stipulations of the above treaty. All such compacts, when freely entered into, are binding, notwithstanding that they limit the natural rights of independent States.²

By the
rights of
others

§ 21. These incidental rights may also be modified, or limited, by the equal and corresponding rights of other States. If, under the plea of self-defence, a nation makes extraordinary warlike preparations, inconsistent with pretended pacific intentions, and threatening to the peace and inde-

¹ Phillimore, *Int. Law*, vol. i. §§ 210, 211; Polson, *Law of Nations*, sec. 5.

² Martens, *Recueil des Traités*, tom. ii. p. 469; Phillimore, *Int. Law*, vol. iii. Appendix, pp. 828 et seq.; Ortolan, *Diplomatie de la Mer*, tom. ii. App. spécial; ch. vi. § 21, *infra* note.

pendence of others, such threatened States may very properly demand an explanation, and if none of a satisfactory character is given, require a discontinuance of such hostile demonstrations. Such hostile preparations, if not satisfactorily explained, may become a matter of serious complaint, but seldom, if ever, in themselves alone a just cause of war.

§ 22. A distinction, however, must be made between those means and preparations for self-defence which are exclusively *defensive*, and those which, from their nature, may also be regarded as offensive. Thus an extraordinary increase of the military and naval forces of a State, may be calculated to alarm other nations whose peace and security they may appear to menace. It is, therefore, usual under such circumstances to require, and to receive, amicable explanations of such warlike preparations. And if asked for in a proper tone and spirit, the explanation cannot be properly refused, without giving offence, or, at least, well-founded cause for suspicion.¹

Increase
of army
and navy

§ 23. Not so, however, with respect to the erection and arming of fortifications, which are essentially means of defence and self-preservation. That such works are of immense assistance in carrying on military and naval operations against others cannot be doubted, but they cannot of themselves be injurious or dangerous to foreign Powers. They, therefore, are not just causes of complaint by others. The same may be said of military schools, and a general diffusion of military education and military science among the subjects of a State. They are legitimate and proper means of self-preservation, which every sovereign State has a perfect right to use; and others have no right to require an account of its conduct in this respect.²

Of forti-
fications
and
military
schools

§ 24. The means of self-preservation which we have hitherto considered as the right of a sovereign State to resort to, are such as are made *within* its own dominions, or on the high seas. It has been contended by some that, for the same reasons, and in exercise of a pacific right of self-defence, a State may extend its precautionary measures *without* its own territorial limits and within the borders of a neighbouring

Extra-
territorial
defence

¹ Martens, *Précis du Droit des Gens*, §§ 117, 118; Pinheiro-Ferreira, *Com. sur Martens*, tom. i. note 62; Moser, *Versuch.*, t. vi. pp. 409, 413; Gunther, *Europ. Völkerrecht*, b. i. pp. 293-319.

² Jomini, *Précis de l'Art de la Guerre*, ch. ii. sec. i. § 1; Halleck, *Elem. Mil. Art and Science*, ch. iii.

State, while others assert that, if threatened, it may indeed cross the frontier of the neighbouring State to attack or destroy the danger which menaces it, but that the act is performed in exercise of a belligerent right, and is one of hostility belonging to the class of hostile operations known as *imperfect war*. This contention is based on the argument that there can be no conflict of rights, *stricti juris*, between States in time of peace; that no such principle is admitted in the code of *public* international law; that it is a maxim of that law that every *right* is followed by corresponding *duties* and *obligations*; and, therefore, if one State had a right to violate the territory of a neighbour in time of peace, for what it saw fit to consider the purposes of self-defence, that neighbour would be bound to permit its territory to be violated so often as the other party might conceive that the necessity exists. But it being an established principle that every sovereign State has a right to protect the inviolability of its own territory, and that any invasion of it is an act of hostility, which may be repelled by force, the other party might also enforce, with arms, if need be, its own right of territorial transgression, incident to its *paramount* right of self-defence! Here, then, we should have force repelling force in the *pacific* exercise of established public international rights.¹

In support of the first contention, Sir R. Phillimore describes a hypothetical case. 'A rebellion, or a civil commotion, it may happen, agitates a nation; while the authorities are engaged in repressing it, bands of rebels pass the frontier, shelter themselves under the protection of the conterminous State, and from thence, with restored strength and fresh appliances, renew their invasions upon the State from which they have escaped. The invaded State remonstrates. The remonstrance, whether from favour to the rebels or feebleness of the executive, is unheeded, or, at least, the evil complained of remains unredressed. In this state of things, the invaded State is warranted, by international law, in crossing the frontier, and in taking the necessary means for her safety, whether these be the capture or dispersion of the rebels, or the destruction of their stronghold, as the exigencies of the case may

¹ See 'imperfect war,' *infra*, ch. xvi.; Webster's *Works*, vol. ii. pp. 119-120; vol. v. p. 116; vol. vi. p. 254; *Revue de Législat. Franc. et Etrang.*, t. ix. p. 31.

fairly require.' He then proceeds to say, 'The hypothetical case here described was that which Great Britain alleged to have actually occurred, except that the circumstances were of a more aggravated character, with respect to the invasion of her Canadian possessions in 1838. For she alleged that the Canadian rebels not only found shelter on the American frontier of the Niagara, but that American citizens joined the rebels, and that they obtained arms, by force indeed, from the American arsenals, and that shots were fired from an island within the American territories, while a steamer called the *Caroline* was employed in the transport of munitions of war to the island, which when not so employed was moored off the American shore. In this state of things a British captain and crew, having boarded and forcibly captured the *Caroline*, cut her adrift, and sent her down the falls of Niagara. The act was made the subject of complaint, on the ground of violation of territory, by the American Government, and vindicated by Great Britain on the ground of self-preservation; which, if her version of the facts were correct, was a sufficient answer, and a complete vindication.' He also says that 'international law considers the right of self-preservation as prior and paramount to that of territorial inviolability, and, where they conflict, justifies the maintenance of the former at the expense of the latter right.'¹

¹ Phillimore, *Int. Law*, vol. i. §§ 214-218; Phillimore, *Letter to Lord Ashburton*, pp. 27 et seq.; Vattel, *Droit des Gens*, lib. iii. ch. vii, § 133; and see *infra*, ch. xiv. § 20, the case of the 'Caroline.'

CHAPTER V

RIGHTS OF EQUALITY

1. Natural equality of sovereign States—2. Consequences of this equality—3. Titles of States and of their rulers—4. Effect of custom and treaty upon rights of equality—5. Claims of the Pope and of the Emperor of Germany—6. Rights and precedents of rulers and representatives of States—7. Examples of disputes, and the mode of arranging them—8. Royal honours—9. Emperors and kings—10. Monarchical sovereigns—11. Semi-sovereign and dependent monarchical States—12. Rank of republics—13. General rule of equality and precedence—14. Usage of the Alternat—15. Language of diplomatic intercourse and treaties—16. Military and maritime ceremonies—17. How regulated—18. Maritime ceremonies in the narrow seas—19. In foreign ports and on the high seas—20. Treaties respecting salutes, &c.—21. General rules established by text-writers—22. Salutes between ships and forts—23. Ships in foreign ports—24. Regulations as to salutes in the British navy—25. French naval regulations—26. Spanish regulations—27. United States army and navy regulations—28. Difficulties in the application of these rules.

**Natural
equality
of States**

§ 1. 'NATIONS,' says Vattel, 'composed of men, and considered as so many free persons living together in the state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign State than the most powerful kingdom.' In other words, all sovereign States, without respect to their relative power, are, in the eye of international law, equal, being endowed with the same natural rights, bound by the same duties, and subject to the same obligations. 'One of the fundamental principles of public law, generally recognised,' says Sir William Scott, 'is the perfect equality and independence of all distinct States.' Relative magnitude creates no distinction of right; relative imbecility, whether permanent or casual, gives no additional right to the more powerful neighbour, and any advantage seized on that ground is mere usurpation. This is the great

foundation of public law, which it mainly concerns the peace of mankind, both in their political and private capacities, to preserve inviolate.

§ 2. A necessary consequence of this equality of sovereign States is the general rule of public law, that, 'whatever is lawful for one nation is equally lawful for any other; and whatever is unjustifiable in the one is equally so in the other.' Vattel, in discussing the sovereignty and independence of States, says that the effect of such a *status* 'is to produce, at least externally and among men, a perfect equality of rights between nations, in the administration of their affairs and the pursuit of their pretensions, without regard to the intrinsic justice of their conduct, of which others have no right to form a definite judgment; so that what is permitted in one is also permitted in the other, and they ought to be considered, in human society, as having equal rights.'¹

Consequences in regard to rights

§ 3. Another necessary consequence of this equality is the rule that all sovereign princes and States may assume whatever titles of dignity they think fit, and may exact from their own subjects the corresponding marks of honour. But their recognition by other States is not a matter of strict right, especially in the case of new titles of higher dignity assumed by sovereigns. Thus, the royal title of King of Prussia assumed by Frederick I., in 1701, was not acknowledged by the Pope until 1786, nor by the Teutonic knights until 1792. So Peter the Great in 1701 changed his title of Czar to Emperor of all the Russias. The change was gradually recognised—by England, by Prussia, the United Netherlands and Sweden in 1723; by Denmark in 1732; by Turkey in 1739; by the Emperor in 1745-6; by France in 1745; by Spain in 1759, and by Poland in 1764. In 1745, Elizabeth of Russia announced her intention to be termed Empress instead of Czarine. In recognising this title, France claimed a reservation of the right of precedence; and a *reversal*, or letter acknowledging that the change in title made no alteration in the precedence, was signed by her. Peter III., who succeeded her, also signed a *reversal*. Catherine II. refused to sign a reversal, but issued an edict to her subjects declaring that, notwithstanding her title, she would only rank with other sove-

In regard to titles

¹ Vattel, *Droit des Gens*, Prélim. §§ 18, 21; the 'Louis,' 2 *Dod. R.*, 243; the 'Antelope,' 10 *Wheat. R.*, 120.

reigns. A delay has been made by more modern States in the recognition of the new titles of higher dignity assumed by sovereigns of other States.¹

Effect of
custom
and
treaties

§ 4. Where, however, we wish to promote a friendly intercourse with another nation, or to have another State recognise the titles we have conferred on our public officers, we cannot very well refuse to acknowledge those which it has given to its rulers; so, also, with respect to honours and distinctions claimed as due to such rulers, policy, friendship, and fear have not unfrequently induced certain States to yield the precedence to others. This has caused the establishment in Europe, at different periods, of different regulations with respect to foreign ceremonial. This ceremonial is founded, in part, upon custom, and, in part, upon the stipulations of conventions and treaties. There can be no doubt that the natural equality of sovereign States may be modified by the consent which is implied from constant usage, or by positive compacts voluntarily entered into, so as to entitle one State to a superiority over another in respect to external matters, such as rank, titles, and other ceremonial distinctions.

§ 5. Thus the Catholic Powers concede the precedence to

¹ The title of 'King of Italy' was assumed in 1861 by the King of Sardinia. England and France, as well as the United States, Switzerland, Greece, Turkey, Portugal, Sweden and Norway, Denmark, and the Netherlands recognised the title; but Austria, Russia, and Spain hesitated at first to give their consent. In 1876, the 39 Vict. c. 10 was passed, being 'An Act to enable Her Most Gracious Majesty to make an addition to the Royal Style and Titles appertaining to the Imperial Crown of the United Kingdom and its Dependencies.' On the following day, a Royal Proclamation, after reciting the terms of the above Act, declares that 'we, with the advice of our Privy Council, appoint and declare that henceforth, so far as conveniently may be, on all occasions and in all instruments wherein our style and titles are used, save and except all charters, commissions, letters-patent, grants, writs, appointments, and other like instruments, not extending in this operation beyond the United Kingdom, the following addition shall be made, in these words: "Indiæ Imperatrix," "Empress of India." It provides that all money then or to be current in the United Kingdom or dependencies shall, notwithstanding such addition, be lawful. On the passing of the above statute, the Prime Minister (Mr. Disraeli) gave the pledge that 'under no circumstances would her Majesty assume by the advice of her Ministers the title of "Empress" in England,' nor would the princes of the blood Royal be designated 'Imperial,' or bear any title denoting an Imperial connection. At the time of the union with Ireland, in the Act of Union there was a proviso enabling the Sovereign to announce by proclamation under the great seal what style and title he would assume; George III. issued a proclamation accordingly, and adopted the style of 'King of the United Kingdom of Great Britain and Ireland and its dependencies.'

the Pope as the visible head of the Church ; but Russia and Turkey and the Protestant States of Europe consider him only as the bishop of Rome, and a sovereign prince, although since September 20, 1870, he has been dispossessed of all territory, except the Vatican, the Church of Santa Maria Maggiore, Castel Gandolfo, and their dependencies. By the terms of the Italian royal decree of May 13, 1871, the Pope is guaranteed his sovereign rights and other immunities by Italy (see the appendix to this chapter). The Pope, however, has refused to accept this decree, although the Italian Government submit themselves to its provisions. It is obvious that this decree cannot confer any international status on the Pope. He maintains, notwithstanding his loss of temporal possession, diplomatic relations with Catholic and with some non-Catholic States.

Claims of
the Pope
and of
Emperor
of
Germany

The Emperor of Germany, under the former constitution of the empire, claimed precedence over all other temporal princes, as the supposed successor of Charlemagne and of the Cæsars. He was crowned at Rome, and the princes of Germany, who were his feudatories, acknowledged his supremacy. But it has been said that this was never acknowledged by the great kings, such as those of England, France, and Spain. By the dissolution of the Germanic Constitution, and the new organisation of the Austrian Empire, the claim is considered to have been lost.

§ 6. The sovereign or ruler of a State is considered, in international law, as representing, in his person, its sovereign dignity. It matters not whether he is a monarch or a president, whether he is the *de facto* or the *de jure* head of a nation (if he has been duly recognised as such); custom has invested his person with certain international rights, as the representative of his State. He is, therefore, entitled to the precedence and honour due to the nation of which he is the ruler. But as sovereigns and rulers seldom meet in council, questions of this kind do not often arise between them individually. There, however, were no less than five such congresses between 1814 and 1821, viz.: the congress of Vienna, 1815 ; of Aix-la-Chapelle, 1818 ; of Troppau, 1820 ; of Verona, 1820 ; and of Laybach, 1821. As all matters of etiquette and precedence in such congresses are usually arranged before the meeting of the sovereigns, questions of precedence are not likely to arise

Dignity
of a State
repre-
sented by
its ruler

in the congress itself. Difficulties of this kind, in former times, not unfrequently arose between public ministers who were considered as representing the sovereignty of their respective States, and who consequently claimed honours which others were unwilling to concede. This led to serious disputes, which were sometimes attended with fatal consequences.¹

Diff-
culties
between
ministers

§ 7. We find numerous examples of these disputes in European diplomacy of past ages, some of a serious character and others exceedingly ludicrous. Thus, at the public entry of the Swedish Ambassador into London, a contest for precedence took place between the French and Spanish ambassadors, which was attended with loss of life on both sides, and probably would have led to war, if the King of Spain, who was interested in maintaining peace with France, had not made such concessions as to satisfy the pride of Louis XIV. Again, the ambassadors of two Italian princes met on the bridge at Prague, and as neither would give way, they stood for the greater part of the day, face to face, exposed to the jeers of the crowd collected by the strangeness of the spectacle. Such disputes, sometimes serious and sometimes ludicrous, have led to the adoption, at different times, of certain conventional rules of etiquette and precedence. These rules are binding only upon those who have agreed to them. They, however, serve as a basis for the adjustment of any disputes which arise between others who are not parties to these conventional agreements.²

Royal
honours

§ 8. The customary law of European nations has attributed to certain States what are called *royal honours*, which entitle the States, by whom they are possessed, to precedence over all others who do not enjoy the same rank, with the exclusive privilege of sending to other States public ministers of the first rank, together with other distinctive titles and ceremonies. Among the princes who enjoy these honours, differences have arisen with respect to relative rank and precedence; but these questions are now mostly settled by usage and treaty stipulations, and, where not thus settled, they are re-

¹ Phillimore, *Int. Law*, vol. ii. §§ 39, 101, 102; Heffter, *Droit International*, § 55; De Cussy, *Précis des Événements*, passim.

² Wicquefort, *L'Ambassadeur*, &c., liv. i. § 24; Villefort, *Privilèges Diplomatiques*, passim.

garded as of very little importance, or, at least, of not sufficient consequence to lead to very serious national differences or discussions.

§ 9. The title of 'emperor,' from the historical associations **Emperors and kings** connected with it, was formerly considered as the most eminent and honourable among all sovereign titles ; but it is not now regarded by other crowned heads as conferring any prerogative or precedence over monarchical sovereigns of another name, ruling States of equal rank and dignity. The title of 'king' is now considered as equal in every respect to that of 'emperor.' In fine, the influence and importance of the sovereign result rather from the rank and importance of the State, than from the name and nature of the title conferred upon its ruler.¹

§ 10. Among monarchical sovereigns, those who enjoy **Mo narch-royal honours, but are not crowned heads, concede the preference, on all occasions, to emperors and kings ; and the princes sove. reigns** who do not enjoy royal honours yield the precedence to those who are entitled to them. This rule is based on the consent of the parties themselves, and does not extend to their intercourse with other States. That is, a State whose ruler does not wear a crown, may give precedence to one which does, but this concession does not preclude the same State from claiming equal rank with a third Power which contests the right of precedence with the State to which it had yielded that honour.²

§ 11. In all matters of ceremony and etiquette, the representatives of semi-sovereign or dependent monarchical States **Semi-sovereign and dependent States** rank below the representatives of sovereign and independent monarchical States, and, of course, and as a matter of necessity, below those of the State on which they are dependent, or whose protection or *suzeraineté* they claim or acknowledge. But where third parties are concerned, their relative rank must be determined by other considerations ; and they may even take precedence of States completely sovereign, as was the case with the Electors under the former constitution of

¹ Martens, *Précis du Droit des Gens*, § 127 ; Klüber, *Droit des Gens Mod.*, § 95 ; Polson, *Law of Nations*, sect. v. ; Martens, *Guide Diplomatique*, tom. i. §§ 65, 66 ; Garden, *De la Diplomatie*, tom. i. p. 355.

² Wheaton, *Elem. Int. Law*, pt. ii. ch. iii. § 3 ; Phillimore, *Int. Law*, vol. ii. § 41 ; Heffter, *Droit International*, § 53.

the Germanic Empire, in respect to other princes not entitled to royal honours.¹

Republics

§ 12. It will be observed that these regulations for determining the relative rank of States, or of their representatives, established in part by usage and custom, and in part by the Congress of Vienna in 1815, relate exclusively to monarchical sovereigns. An abortive attempt was made at the same congress to classify the different States of Europe, with a view to determine their relative rank. A committee was appointed for this purpose in December, 1814; their report was discussed in February, 1815, and its adoption indefinitely postponed, doubts having arisen with respect to the proposed classification, and especially as to the rank assigned to republics. It therefore appears that republics have no definite rank assigned to them by the rules of ceremonial etiquette in Europe, in the intercourse of their representatives with those of monarchical sovereigns.²

General
rule of
equality
and
preced-
ence

§ 13. It may be stated, as a general rule resulting from the natural equality of States as members of a universal community, and subject alike to the same general code of international jurisprudence, that all sovereign States, no matter what may be their form of government, are equal before the law, and no one can claim any superiority or precedence over another. Republics are, therefore, entitled to the same rank as monarchies, unless they themselves have yielded their natural right of equality and conceded the precedence to others. Formerly, the Roman Republic considered all kings as very far beneath it; but when the monarchs of Europe found none but feeble republics to oppose, they disdained to admit them to an equality. Nevertheless, the powerful Republics of Venice and of the United Provinces assumed the honours of crowned heads. Cromwell would not allow the slightest mark of honour which had been paid to the representatives of the monarchy to be omitted towards those of the Republic of England. In the treaties between the French Republic and the other European Powers, it was expressly stipulated that the same ceremonials, as to rank and etiquette, which had been observed before the revolution of 1789, should be con-

¹ Horne, *On Diplomacy*, sec. i.

² Bello, *Derecho Internacional*, pt. i. cap. xviii. § 3; Klüber, *Acten des Wiener Congresses*, tom. viii. pp. 98-116.

tinued between them. The States of Europe observe the same rule toward the present Republic of France. The United States of North America, the Germanic Confederation, and Switzerland (collectively, not in its individual cantons), have been considered as entitled to the same rank as the monarchical States of Europe.

§ 14. Where the rank of different States is equal or undetermined, resort has sometimes been had to the usage of the *alternat*, as it is called, by which the rank and places of different Powers is changed from time to time, either in a certain regular order, or one determined by lot. Thus, in drawing up certain treaties and conventions, it is the usage of certain Powers to *alternate*, both in the preamble and the signatures, so that each Power occupies, in the copy intended to be delivered to it, the first place. Another expedient, sometimes resorted to in order to avoid controversies respecting the order of signatures to treaties and other public acts, is that of signing in the alphabetical order of the names of the respective States which are parties to these acts, the French alphabet being adopted for that purpose. Thus, at the Congress of Vienna, in 1815, the plenipotentiaries signed in the following order : Austria, Denmark, Espagne (Spain), France, Great Britain, Prussia, Russia, Sweden ; but it was distinctly understood, at the time, that this practice was not to be taken as derogating from the ancient usage of the *alternat*. Usage of
the
Alternat

§ 15. At one time the Latin language was used as a matter of general convenience in the diplomatic intercourse between the different nations of Europe.¹ Toward the end of the fifteenth century, the preponderance of Spain contributed to the general diffusion of the Castilian tongue as the ordinary medium of political correspondence. This, again, in the age of Louis XIV., was superseded by the French language, which became the almost universal diplomatic idiom of the civilised world. The primitive equality of States authorised each nation to make use of its own language in treating with others, and this right is still preserved in the practice of many States : each carrying on its diplomatic correspondence in its own language, and treaties between them being written in Diplo-
matic lan-
guage

¹ Records of English courts of justice were written in Latin until the reign of George II.

their respective languages in parallel columns. Where the States which enter into negotiation or treaty have a common language, they generally make use of it in their transactions with each other.

**Military
and
maritime
ceremonial**

§ 16. The usage of nations has established certain military and maritime ceremonials to be observed, either on the ocean between ships, or in ports between ships, and between ships and forts, or on land between armies, forts, military and naval officers, and the military honours to be paid to high civil officers. Among these is the salute by striking the flag, or the sails, or by firing a certain number of guns, &c. These are matters of, perhaps, trivial importance in themselves, but their due observance facilitates the amicable intercourse of nations, and their neglect frequently leads to international differences, dissensions and enmities, which have sometimes terminated in long and bloody wars.

**How
regulated**

§ 17. Every sovereign State has the exclusive right, in virtue of its independence and equality, to regulate the ceremonies to be observed within its own territorial jurisdiction. This extends to the ceremonials between its own ships on the high seas, and to the honours to be rendered by them to foreign ships on the high seas, and to ships and to fortresses in foreign ports. Regulations for determining these ceremonies, and the reciprocal honours to be rendered by one nation to another, are established by municipal ordinances, by usage, and by the stipulations of treaties.

**In the
narrow
seas**

§ 18. Questions of territorial jurisdiction, or dominion over the narrow seas, have not unfrequently given rise to contentions with respect to the maritime honours to be rendered to the flag of the State claiming such dominion, by the vessels of others who denied its pretensions to such supremacy. This kind of supremacy was claimed by Great Britain over the narrow seas, by Denmark over the Sound and Belts at the entrance of the Baltic Sea, and by Venice over the Adriatic Sea or Gulf of Venice; and serious international difficulties resulted in former times with respect to the formalities and maritime honours required by these States, and the neglect or refusal of others to observe or render them. But these peculiar formalities, formerly required by particular States, in particular places where their dominion was disputed, are now

either entirely suppressed, or modified and regulated by treaty stipulations.¹

¹ Phillimore, *Int. Law*, vol. ii. § 34 ; Schlegel, *Staats-Recht des K. D.*, Th. i. p. 412 ; Martens, *Nouveau Recueil*, tom. viii. p. 72 ; Ortolan, *Dip. de la Mer*, liv. ii. ch. xv. ; Chitty, *Commercial Law*, vol. ii. p. 324 ; Heffter, *Droit International*, §§ 32, 197 ; De Cussy, *Droit Maritime*, liv. i. tit. ii. § 61 ; liv. ii. ch. xxix. ; Garden, *De la Diplomatie*, liv. iii. § 2.

Examples of certain States having prescribed rules of navigation to other States may be found in ancient history. The City of Tyre claimed the adjoining seas ; the Romans gave directions to the Carthaginians ; the Athenians prohibited the Median ships of war from entering their seas, and also dictated to the Lacedæmonians.

The dominion was claimed by Great Britain over the *British Seas*, that is, not only over the Channel, but over the four seas ; the extent of this jurisdiction is mentioned in a treaty made with the Dutch in 1653, and in a subsequent treaty, five years later, the dominion is defined to be from Cape Finisterre to the middle point of the land Van Staten, in Norway. From the case of the *Queen and Sir John Constable* (H. 29 Eliz. B.R., Leonard, part 3, 72), it appears that before the Union the British dominion on the sea was claimed, not only midway to, but as far as, the coasts of France, and that it extended midway to the coast of Spain.

In the third year of Henry V. it was directed by proclamation of the king that no British subject, for one year from the date thereof, was to go to the insular ports of Denmark and Norway or to Iceland for the purpose of fishing or for any other cause to the prejudice of those realms, *otherwise than it had been accustomed of old*.

In the reign of Edward I. one, Reyner Grimbald, a French admiral, was ordered by a mixed tribunal of judges (chosen by the English and French kings for the purpose of administering justice *secundum legem mercatoriam et formam sufferantia* to all merchants) to make satisfaction and suffer punishment because, during war between Philip, King of France, and Guy, Earl of Flanders, he had despoiled Flemish and English merchants of their goods on the English seas. These judges, together with the procurators of the Genoese, the Catalonians, the Spaniards, the Germans, the Zealanders, the Dutch, the Danes, the Norwegians, and of most of the maritime nations of Europe, jointly declared 'that the kings of England, by right of the said kingdom from time to time, whereof there is no memorial to the contrary, have been in peaceable possession of the Sovereign Lordship of the seas of England and of the isles within the same, with power of making and establishing laws, statutes, and prohibitions of arms, and of ships otherwise furnished than merchantmen used to be, and of taking surety, and affording safeguard in all cases where need shall require, and of ordering all things necessary for the maintaining of peace, right, and equity among all manner of people, as well of other dominions as their own, passing through the said seas, and the sovereign guard thereof.' It is to be observed that Edward I. did not possess Normandy, and therefore the dominion of the British seas could not have been claimed by him as *dominus utriusque ripæ* ; this argues in favour of the British seas being annexed to the Kingdom of England by prescription.—*Rolls Abridgment*, 528 ; and see Selden, *De Dom. Maris*, l. 2, c. 14, 27, 28 ; Coke, 4 *Inst.*, 142.

Again, it is enacted, by 5 Edward IV., cap. 6 (1465), that no foreigners may fish 'in Irish countries,' i.e. off the coast of Ireland, without a licence from the Lieutenant of Ireland, upon pain of forfeiture of the ships and goods to the king.

The dominion of the sea was held to confer on its possessor the sole right of fishing for pearl, coral, &c., all royal fish, and also the direction

In foreign
ports and
on the
high seas

§ 19. Not only in the narrow seas, but also upon the ocean when the ships of different nations happened to meet, serious questions sometimes arose with respect to the time and character of reciprocal salutes. Ortolan has given us numerous instances of these difficulties and disputes, which not unfrequently terminated in actual war. As the lowering or 'duty of the flag' was considered an act of humiliation, the custom was entirely dispensed with about the middle of the eighteenth century, and salutes were confined to the firing of cannon. Nevertheless, the vessels of the Great Powers for a long time refused to salute those of the smaller States; and those of crowned heads, on entering ports and harbours of republics, required the forts of the latter (contrary to ordinary rule) to salute first. But all these pretensions were finally abandoned in the course of the eighteenth century, and vessels of different States saluted each other without any reference to the relative character or power of their several governments, the salutes being, by general consent, divested of all idea of domination or supremacy.¹

and disposal of all other fish. (Palatius, *De Dom. Mar.*, lib. i. c. ii. ; Sir J. Constable's case, *suprà*.)

Such as were born on the four seas of England were accounted British subjects, and not aliens. (Selden, *Mar. Claus.*, lib. ii. c. 24 ; Coke, 4 *Inst.*, fol. 142.)

Queen Elizabeth, in 1600, stamped a *portcullis* on those dollars destined for the East Indian trade, to signify the right of closing navigation in her seas.

The Captain of the Gulf of Venice resided on the Isle of Corfu, and with ships of war and galleys protected the navigation and kept it free from pirates. In particular, no vessels of the Pope, of the King of Spain, or of the Sultan of Turkey, could enter the gulf without the licence of the State. In 1638 a Turkish fleet was attacked by the Venetians, and many of their ships were sunk, for a disregard of this requirement. (See Baptista Nani, *Hist. of Venice*, lib. ii. fol. 446 et seq.) So jealous were the Venetians of permitting ships of any other State to navigate the gulf, which they deemed part of their domain, that in 1630 they refused to permit the Queen Mary, sister of the King of Spain, and married to the King of Hungary, to sail from Naples to Trieste in vessels of the Spanish navy, but required her to embark in Venetian galleys, declaring that, if she proceeded in any other way, the Republic would by force assert their proper rights to attack the Spanish navy as if they were enemies, and in a hostile manner invade them. The queen was subsequently carried in the Venetian vessels with great courtesy and ceremony. (Palatius, *De Dom. Mar.*, ii. c. 6 ; also Paucius, *De Dom. Mar. Adriat.*)

¹ Cleirac, *Us et Coutumes de la Mer*, p. 513 ; Bouchard, *Théorie des Traités de Commerce*, p. 427.

This 'duty of the flag,' as it was termed, although of immemorial prescription, is to be found mentioned in 'Le Ordinance de Hastings,' made in the reign of King John, which decrees 'that if a lieutenant, in any

§ 20. Of the treaties entered into between different States respecting salutes, we will refer to the following. By ^{Treaty} ^{regu-} ^{lations}

voyage being ordained by Common Council of the Kingdom, do encounter upon the sea any ships or vessels, laden or unladen, that will not strike and veil their bonnets at the commandment of the lieutenant of the King, but will fight against them of the fleet, that if they can be taken, they be reported as enemies, and their ships, vessels, and goods taken and forfeited as the goods of enemies, although the masters or possessors of the same would come afterwards and allege that they are the ships, vessels, and goods of those that are friends to our Lord the King, and that the common people in the same be chastised by imprisonment of their bodies for their rebellion by discretion.'

It is also mentioned in the treaty of peace granted to the Dutch by Great Britain in 1653. This declares (Art. 13) 'that the ships and vessels of the said United Provinces, as well men-of-war as others, be they in single ships or in fleets, meeting at sea with any of the ships of this State of England or in their service, and wearing the flag, shall strike the flag, and lower their topsail in such manner as the same hath been formerly observed in any times whatsoever.'

When the 'duty of the flag' was claimed by England, there was a clause in the naval instructions, directing the admiral and commanders under him, in case they met with any ships on the British seas which refused to render this duty to them, that they should treat them as enemies (without any declaration of war), and seize them and confiscate the goods in the ships.

A small French frigate arrived in the Downs in 1769 without lowering her pendant to the king's ships. An officer was sent on board her to demand that respect; but without effect, until the 'Hawke' sloop drew up alongside of the French frigate and fired two shots at her, who thereupon lowered her pendant. (*Ann. Reg.*, vol. xii. p. 131.)

By Article 11 of the Protocol of December 30, 1814, made at Vienna by the eight members of the Commission representing Austria, Spain, France, Great Britain, Portugal, Prussia, Russia, and Sweden, it was concluded that:—'Le salut dans les Ports et en haute mer est réglé pour les vaisseaux et escadres des puissances mentionnées en l'article 5 d'après le principe énoncé à l'article 10.—Les règlements nécessaires à l'application de ce principe seront déterminés sur le pied de la plus parfaite réciprocité.—Les vaisseaux des autres états accordent les premiers le salut à ceux des puissances mentionnés ci-dessus.' The Plenipotentiary for Great Britain said 'qu'il n'exprimait point une opinion contraire au principe énoncé dans cet article, mais qu'il ne se trouvait pas muni des informations qui lui ont paru nécessaires relativement aux usages établis, ni des instructions de sa cour au sujet des règlements militaires; à cet égard il demandait qu'on insérât sa réserve sur cet article au protocole.' This was accordingly done. The Powers mentioned in the said article 5 are those of the Pope, Netherlands, United States of America, and Swiss Confederation. The said Article 10 declares that 'lorsqu'un traité ou autre acte officiel comprendra plusieurs des puissances mentionnées à l'article 5 dans l'original, qui devra rester à chacune d'elles, le nom de cette puissance sera placé le premier et celui des autres souverains le sera dans l'ordre de leur événement à la couronne, et pour les Républiques d'après la date de l'élection de leur premier magistrat.' On February 7, 1815, it was reported to Lord Bathurst, by the Admiralty of Great Britain, that in their opinion difficulty would arise on the above subject. England had always claimed the sovereign dominion of the British seas, comprehended between the meridian of Cape Finisterre and the latitude of Van Staten in Norway, and within those limits had always enforced acknowledgment

article nineteen of the treaty of August 30, 1721, between Russia and Sweden, it was stipulated that there should be a from other ships in their striking their flag and topsail. In later times the 'homage' was not insisted on, nor paid for many years, but Great Britain had not formally renounced it. They were unwilling to advise that it should be formally renounced. It was then the practice (and no inconvenience was felt from it) to abstain from salutes on the high seas, and for the stranger ship to salute first the flag of the country in whose port she arrived.

The directions to claim the 'duty of the flag' were omitted from the naval instructions in 1805, and the practice may now be considered obsolete.

See further on this subject the British Naval Instructions for 1806, *Salutes* 10, 15, 16, 23, 24.

By a Declaration signed at Madrid, March 2, 1865, by and between the British and Spanish Governments, it was agreed to abolish the regulations by virtue of which it was required that merchant vessels which cruised in the Straits of Gibraltar, should show their flag in passing within cannon shot of the places of war and fortresses belonging to those Powers respectively, and commanding the said Straits; and it was equally agreed to abolish the intimation by means of shots—first with powder only, and afterwards with ball—to those vessels which might neglect or refuse to show their flag. This agreement does not apply to time of war. In the 'Treatise of the Dominion and Laws of the Sea,' dedicated by Alexander Justice in 1705 to the Lord High Admiral, H.R.H. the Prince of Denmark, the following (which, as above explained, is now obsolete) occurs :—

'Now as to the nature and effects of this dominion in the sea, where it is regularly exerted it very justly entitles all sovereigns that are in lawful possession of it to the six following prerogatives, not only over their own subjects, *but over all others* that are allowed the free enjoyment thereof. . . .

'5. The power of granting free passage through any such sea to any number of ships of war *belonging to any other Prince or Republic, or of denying the same* according to the circumstances and occasion of such passage in the same manner as any Prince or State may grant or deny free passage to foreign troops through their territories by land, even though the Prince or State to whom such ships or land-forces belong be not only at peace but likewise in alliance with the Prince or Republic of whom passage is desired.

'6. All foreign ships whatever, whether ships of war or others, navigating within those seas and there meeting with any of the ships of war or others bearing the colours of the sovereign of such seas must salute the said ships of war *by striking the flag and lowering the topsail*, by which sort of submission the saluters are put in remembrance that they are entered into a territory, in which there is a sovereign Power and jurisdiction to be owned and protection to be expected from it.

'And as to the duty of the flag, or the salutation above spoken of, it is not, as some may perhaps imagine, an indifferent honorary ceremony or bare civility, but *a real and expressive sign* and acknowledgment that the absolute sovereignty of the seas in which they are obliged to strike their colours and sail is vested in the Prince to whose flag they pay that duty, without the performance of which they could not be allowed (though friends) to pass and sail therein.'

The following is the form of commission of the Lord High Admiral of England, in the reign of Richard II. :—

'We give and grant to N. the office of our Great Admiral of England, Ireland, Wales, and of the dominions and Islands belonging to the same,

reciprocity in the number of guns to be fired by vessels passing Russian and Swedish fortresses. By the treaty of January 11, 1787, between France and Russia, it was stipulated that, in order to avoid all the difficulties to which the flags and different grades of officers might give rise, there should be no salutes between the vessels of the two nations, either on the high seas or in port. By article ten of the treaty of January 17, 1787, between Russia and the Two Sicilies, it was stipulated that there should be a perfect equality between the two Powers with respect to maritime salutes. Two vessels meeting upon the high seas, that commanded by an officer of the lower rank was to salute first, the salute to be returned gun for gun ; if the commander should be of equal rank, no salute was to be given by either party. In entering a

also of our town of Calais and our marches thereof, Normandy, Aquitaine, and Gascoign ; and we have made, appointed, and ordained, and by these presents we make, appoint, and ordain him, the said N., our Admiral of England, Ireland, and Wales, and our dominions and Isles of the same, our town of Calais and our marches thereof, Normandy, Aquitaine, and Gascoign, as also General Governor over all our fleets and seas of our said kingdoms of England and Ireland, and our dominions and islands belonging to the same ; and know ye further that we of our especial grace, and upon certain knowledge, do give and grant to the said N., our Great Admiral of England and Governor General over our fleets and seas aforesaid, all manner of jurisdictions, authorities, liberties, offices, fees, profits, duties, emoluments, wrecks of the sea, cast goods, regards, advantages, commodities, preeminences, privileges whatsoever, to the said officer our Great Admiral of England and Ireland and of the other places and dominions aforesaid, in any manner whatsoever belonging or appertaining.'

The ordonnance of Louis XIV., published April 15, 1689, directed French ships of war to require salutes from foreign vessels, 'in whatever seas, or on whatever coasts they might meet.' French ships of war, carrying the flag of admiral, vice-admiral, rear-admiral, 'corvettes et flammes,' were to salute first the maritime places and principal fortresses of kings ; the places of Corfu, Zante, and Cephalonia, belonging to the Republic of Venice, and those of Nice and Villafranca, belonging to the Duke of Savoy, were to be saluted first by vessels carrying the flag of a vice-admiral ; but they were to require the other places and principal forts of all other *princes* and *republics* to salute first the admiral and vice-admiral. As early as 1667 the French fleet had required the fortress of Leghorn to salute first, but the Grand Duke of Tuscany had protested against this pretension. All French vessels carrying flags inferior to those of admiral and vice-admiral were to salute first maritime places and principal fortresses. Where the first salute was given by an admiral or vice-admiral, it was to be returned gun for gun ; where given by a vessel of lower grade, it was to be returned by a less number of guns, according to the rank of the commander. A return salute by a vice-admiral was to be given gun for gun. Other sovereigns made pretensions equally absurd against the smaller Powers. The King of Spain, Philip II., forbade all Spanish vessels carrying the arms of Spain to lower their flag to foreign vessels, or to first salute the cities and fortresses of other sovereigns.

port where there was a garrison, the usual salute was to be given, and returned gun for gun ; 'excepting, however, the residence of the respective sovereigns, where, according to general usage, this salute is not given by either party.' By the treaty of November 11, 1730, between Russia and Denmark, concluded for an unlimited time, it was stipulated that Danish vessels should salute first in the North Sea and the White Sea, and that Russian vessels should salute first in the Cattegat and on the coasts of Norway. By the treaty of 1809, between Russia and Sweden, it was stipulated that salutes upon the sea should be according to the rank of the respective officers, the lowest saluting first, and the other returning gun for gun ; that vessels entering ports, or passing castles or forts, should salute first, the return-salute being gun for gun. The same stipulations had been made in the treaty of 1798, between Russia and Portugal. By the treaty of 1827, between Great Britain and Brazil, it was stipulated that the salute should 'conform to the rules observed between the maritime Powers.' By the treaty of 1829, between Russia and Denmark, it was stipulated that vessels of war should continue to salute ports or batteries, the salute to be returned gun for gun ; but that they were not to salute other vessels of rank inferior to an admiral, and that the return-salute by an admiral was to be *less two guns*, and by a grand admiral *less four guns*. But with respect to salutes, there has been a gradual tendency among maritime States to adopt a uniform system, by assimilating the internal laws and ordinances by which their salutes are regulated ;¹ this has resulted in certain international rules, which came into operation on July 1, 1877, between the various maritime Powers. They are as follows :—

I. Salutes from ships of war which will not be returned by the party saluted are as follows : Salutes :—1. To royal personages, chiefs of States, or members of royal families, whether on arrival at, or departure from, a port, or upon visiting ships of war. 2. To diplomatic, naval, military, or consular authorities, or to governors or officers administering a government, whether on arrival at or departure from a port, or when visiting ships of war. 3. To foreigners of high distinction on

¹ D'Hauterive and De Cussy, *Recueil de Traité*s, tom. ii. pt. ii. p. 70 ; Klüber, *Droit des Gens*, § 117 ; Riquelme, *Derecho Pub. Int.*, lib. i. tit. ii. ch. xi.

visiting ships of war. 4. Upon occasions of national festivals or anniversaries.

II. Salutes from ships of war which will be returned gun for gun by the party saluted are as follows :—Salutes : 1. To the national flag on arrival at a foreign port. 2. To foreign flag officers and commodores when met with at sea or in harbour. 3. When a ship or ships of war salute the flag of another nation, or the royal or other personages, or any functionaries of another nation, under similar circumstances, the same rules should, if possible, be reciprocally observed by ships of the latter nation present, as to returning or not returning the salutes.

§ 21. Moreover, publicists have sought to deduce certain general principles which should form the basis of all regulations, and thus remove all cause of difficulty or dispute. They are as follows :—

General
rules of
text-
writers

The method of saluting by striking, or furling, the flag is now entirely abandoned between ships of war, although merchant vessels, as a mark of deference, sometimes salute in this way the men-of-war of their own State. But Ortolan considers even this as an objectionable practice, because the national flag should be considered as a sacred emblem, and should never be lowered voluntarily, not even through deference and as a matter of politeness. A salute by lowering the sails is more suitable and much less objectionable.¹ It is sometimes used by merchant vessels. Merchant vessels of different nations, meeting on the high seas, or in port, do not, as a general rule, salute each other ; sometimes, however, they exchange compliments by lowering their national flags. This, for the reason given above, is by some regarded as an objectionable practice. Such salutations should be confined to private signals, or to the sails.

All sovereign States are, with respect to salutes, to be regarded as equal ; and any inequality of salutes, in respect to time, place, form, or number of guns, is to be regarded as resulting from general agreement, or of individual rank of

¹ On November 4, 1829, a warrant of arrest was issued against the master of the *British* merchant schooner 'Native' for contempt in passing H.M.S. 'Semiramis,' in Cork Harbour, without striking or lowering her royal, being the uppermost sail she was then carrying. *R. v. Benson*, 3 *Hagg.*, 96 n. This duty has not been exacted from British merchantmen by British ships of war since that date.

the parties saluting, and not as conveying any idea of domination or supremacy. Salutes are never, in the absence of treaty stipulations, to be regarded as obligatory, but as a matter of courtesy and etiquette. To refuse an exchange of salutes is, therefore, regarded as evidence of a want of friendship and goodwill, which justifies the other party in asking explanations ; but it cannot in itself be considered an offence or an insult, sufficient to justify hostilities.

When a ship of war, or a squadron, meet upon the high seas another ship of war, or a squadron, courtesy requires that the commanding officer lowest in rank shall salute first, and that the salute be returned gun for gun. Vessels carrying sovereigns, members of royal families, and rulers of States are to be saluted first.¹

Salutes
between
ships and
forts

§ 22. Vessels of war, in entering foreign ports, or in passing foreign forts, batteries, or garrisons, salute first, without reference to the relative rank of the officers of the ships and forts. Such salutes are always to be returned gun for gun. This salute is a compliment to the flag, and, consequently, is international. The same rule holds with respect to the interchange of compliments and visits with the authorities on shore ; the compliment or visit being first made from the vessel, without regard to relative rank, even if it were possible to fix any relative rank for officers so different in their nature and character. The rule, making such compliments international, avoids any necessity of attempting such assimilation.

An apparent exception is made to this rule in the case of vessels carrying persons of sovereign rank or members of the royal family. In such cases, the forts, batteries, and garrisons, always salute first. But such salutes are intended expressly for the persons carried, and not for the vessel carrying them, and, consequently, the vessel does not return the salute. It is customary, however, for such vessel, if foreign, to afterward salute the fort or garrison in the usual manner, which salute is, of course, to be returned gun for gun. Where vessels of war, in foreign ports, land or receive on board their own sovereigns, or officers of their own government, the salutes to

¹ De Cussy, *Droit Maritime*, liv. i. tit. ii. § 62 ; Heffter, *Droit International*, § 197 ; Martens, *Guide Diplomatique*, § 68 ; Martens, *Völkerrecht*, § 155 ; Nau, *Völkerseerecht*, § 139 et seq.

be given and ceremonies to be observed are to be determined by their own laws and regulations. The same remark applies to the compliments to be paid on such occasions by other ships in port, and by the military establishments on shore, each being governed by their own laws and regulations. Every country determines for itself the salutes to be paid to its own authorities,¹ and it will hardly be expected that any higher compliment will be paid to those of other countries of the same rank. All such matters, however, should be

¹ By the Admiralty regulations of Great Britain, salutes to the Lord-Lieutenant of Ireland and to the Viceroy of India are not returned. When the flag of the British Lord High Admiral or the Lords Commissioners of the British Admiralty is saluted by a foreign ship of war on her arrival or on meeting, such salute will be returned gun for gun. The number of guns with which her Majesty's civil, naval, and military functionaries are saluted when in their official capacities is as follows, but these salutes are not given on all occasions, nor within all limits :—The Lord Warden of the Cinque Ports, 19 guns ; the governor or high commissioner of any of her Majesty's colonies, foreign possessions, castles, or fortresses, 17 guns ; the lieutenant-governor, if administering the Government, and if holding a commission direct from the Queen, or acting temporarily for an officer so commissioned, 13 guns ; lieutenant-governors not administering government, if holding a commission direct from the Queen, 13 guns ; an ambassador extraordinary and plenipotentiary, 19 guns ; envoy extraordinary and minister plenipotentiary, and others accredited to sovereigns, with the exception of such as are accredited in the specific character of minister resident, 15 guns ; a minister resident, diplomatic authorities below the rank of envoy extraordinary and minister plenipotentiary, and above that of chargé d'affaires, 13 guns ; a chargé d'affaires, or a subordinate diplomatic agent left in charge of a mission, 11 guns ; a consul-general, 9 guns ; the consul, 7 guns ; the Lord High Admiral, or the Lords Commissioners for executing the office of Lord High Admiral, 19 guns ; the commander-in-chief of, or the officer commanding in chief, the whole army of the United Kingdom, 19 guns ; the first lord commissioner of the Admiralty, 15 guns ; the admiral of the fleet, 17 guns ; the admiral, 15 guns ; the vice-admiral, 13 guns ; the rear-admiral, 11 guns ; the commodore (no senior captain being present), 9 guns ; the field-marshal, 17 guns ; the general, 15 guns ; the lieut.-general, 13 guns ; the major-general, 11 guns ; the brigadier-general, 9 guns ; the captain of the Navy, and officer below that rank, 7 guns.

In India the following salutes are given :—The Queen and Empress, when present in person, 101 guns ; members of the Royal Family, royal standard and royal salutes, or the Viceroy and Governor-General of India, 31 guns ; ambassadors, 19 guns ; governors of Presidencies, the President of the Council of India, or governors of her Majesty's Colonies, 17 guns ; lieut.-governors of provinces in India, members of Council, plenipotentiaries and envoys, or lieut.-governors of her Majesty's Colonies, 15 guns ; agents to the Viceroy and Governor-General, Residents, or chief commissioners of Provinces, and commissioners, 13 guns ; political agents and chargés d'affaires, 11 guns ; the Governor-General of the Portuguese Settlements in India and the Governor of Pondicherry, 17 guns ; the Portuguese Governor of Damann, or the Governor of Dew, 9 guns.

regulated by previous arrangement, and in cases of differences which cannot be accommodated, the party dissenting will take no part in the ceremonies.¹

Ships in
foreign
ports

§ 23. Ship or ships of war of one country, meeting in port, exchange salutes gun for gun. The last arrival salutes first. Salutes are not to be exchanged where the regulations of the place do not permit them. With respect to the ceremony of visit, courtesy requires that the commander of the vessel in port shall first send a message of compliment and inquiry to the commander of a vessel coming into port, and such message of compliment is to be immediately returned by the new comer ; after which the visits of ceremony are to be exchanged, the lowest in rank visiting first. Since March 12, 1877, the British Government having communicated with the various maritime Powers on the subject, the following procedure, in which the maritime Powers generally concur, has been observed in all ports whatsoever by the commanding officers of the ships of the several maritime Powers, viz. :—

Preliminary Visit.—The flag or other officer in command of one or more ships of war in port, whatever may be his rank, will, upon the arrival of any ship or ships of war of another nationality, send an officer to such arriving ship, or, in case of a fleet or squadron, to the ship of the officer in chief command of it, to offer the customary courtesies. The captain of the ship to which this visit is paid will send an officer to return it.

Official Visit.—Within twenty-four hours of arrival the flag or other officer in chief command of the arriving ship or ships will visit the officer in chief command of the fleet or squadron or single ship of war (as the case may be) of another nationality, present at the port, if he be his equal in grade, and the visit will be returned within twenty-four hours of being paid. In the case of officers of different grades, the inferior will, in such cases, pay the first visit, the same limits of time being observed as to the visit and its return.

The grades are :—admiral, vice-admiral, rear-admiral, commodore, captain, commander, lieutenant or other commanding officer.

Officers of superior grades will return calls as follows :—

¹ Riquelme, *Derecho Pub. Int.*, lib. i. tit. ii. ch. xi. ; Moser, *Kleine Schriften*, b. ix. p. 297 ; Martens, *Völkerrecht*, § 155.

All flag officers, including commodores, will return the visits of captains and those of grades superior to captains. They will send their flag captains or commanders to return the visits of commanders, lieutenants, and other officers in command. Captains and officers of a lower grade will return the call of commanders and officers of inferior rank in command.

In the case of a fleet or squadron arriving or being in port, and after the interchange of visits between the senior officers shall have taken place, the captains or other officers in command of the several ships of war arriving will call upon the captains or other officers in command of the ships of war in port, who will return the visits.

Vessels of war in foreign ports celebrate their own fêtes according to the regulation of their own Government. Courtesy also requires them to take part in the national fêtes of the place, by joining in the public demonstrations of joy or grief. The same mark of respect is shown to vessels of a third Power which celebrate fêtes in foreign ports. But if such celebrations are of a character to offend or wound the feelings of their own countrymen, or the nation in whose waters they are anchored—as public rejoicings for a victory gained—ships of war will remain as silent spectators, or leave the ports, according to the circumstances of the case. In public ceremonies upon land, the commandants of vessels or fleets usually land with the officers of their staff, and receive a place of honour, according to the hierarchy of rank, precedence being determined by grade, and, if equal, by date of arrival. In case of disputes as to rank, it is proper for the contestants to withdraw and become mere spectators of the ceremonies.

In dressing or decorating ships on occasions of public fêtes, embarrassments sometimes occur in arranging the flags of different nations. A French ministerial order of April 26, 1827, directs that, in decorating a ship in the ports of France, 'the national flags of foreign vessels of war in the same ports shall be placed in the front line, and in the following order: the national flag of the foreign commanding officer of the highest grade, or, if equal in grade, the flag of the one which arrived first, and successively the flags of other foreign vessels according to the grade of the commanders, or according

to the dates of their arrivals where the grades are equal. If the vessels decorated are in a foreign port, the first place of honour is given to the flag of the nation within whose maritime jurisdiction they are anchored ; next to the flags of foreign vessels of war in the same port, according to the order above indicated, and next to the flags of foreign nations whose consuls residing there hoist their colours on fête days.' But a subsequent ministerial order of 1851 directed French vessels to decorate only with French flags and signals. As signal flags frequently resemble the flags of other nations, care should be taken, even in that mode of decoration, not to give offence by the order of their arrangement. A further decree of 1868, while confirming the order of 1851, leaves a certain discretion to French commanders to conform to local customs, but not to place flags of foreign nations on the same mast as a French flag.

**Regulations
of British
Navy**

§ 24. The regulations of the British Navy are very minute with respect to salutes and honours to be rendered by British ships to British men-of-war, and, also, by one man-of-war to another, or to a squadron or fleet. The commanders of British merchant ships have been punished by the courts for neglecting or refusing to render the honours due, and for assuming to wear the flags, pendants, &c., to which only ships of the royal Navy are entitled.¹

¹ The 'Queen's Regulations and Admiralty Instructions of 1879' contains much information concerning the salutes to be paid by British ships of war, viz. :—

Whenever the Sovereign shall arrive at any place in the British dominions where there is a fort or battery from which salutes are usually fired, a royal salute—i.e. 21 guns—shall be fired from such fort or battery, and also from all the ships and vessels of war present ; and similar salutes shall be fired on the Sovereign's final departure, and on such other occasions as shall be directed. Whenever any member of the Royal Family shall be embarked in any ship or vessel at sea, and the royal standard, or the standard of the Prince of Wales, shall be hoisted in her, every ship and vessel of war meeting her shall fire a royal salute. The royal standard and the standard of His Royal Highness the Prince of Wales do not return salutes ; and no other flag is to be saluted in the presence of those standards. Whenever any foreign crowned heads or sovereign princes, or the consorts of any foreign crowned heads or sovereign princes, or the president of a republic, shall arrive at, or quit, any place in her Majesty's dominions where there is a saluting fort or battery, they shall receive a royal salute on their first arrival, and again on their final departure, from such fort or battery, and from any ships present ; also upon their going on board and upon their leaving a ship a similar salute shall be fired ; on such occasions during the salute the senior officer's ship shall display at her main-top-gallant-masthead the flag of

§ 25. French naval regulations, established by the decree of May 20, 1868, are also very minute on all matters of ceremony, and seem admirably adapted to their purpose. Regulations of French navy

They are as follows :—

1. A commander of one or more ships of war may salute

the nation of such royal or distinguished personage. Whenever any prince, member of a foreign royal family, shall arrive at any British port, or visit any of her Majesty's ships, the same salutes shall be fired and compliments paid to him as to the members of the Royal Family of England, the flag of the nation of such foreign prince being displayed in place of the royal standard. Whenever such visits to her Majesty's ships shall take place in a foreign port, corresponding salutes shall be fired, and the flag of the nation of the royal visitors shall be hoisted. Upon the occasion of the celebration of the birthday of the king or the queen of a foreign nation, or on other important national festivals and ceremonies, by any ships of war or batteries of such nation, her Majesty's ships present may, on official intimation being received by the senior officer, fire such salutes in compliment thereto as are fired by the ships or batteries of the foreign nation, not, however, exceeding 21 guns, and the flag of such nation shall be displayed on these occasions at the main-top-gallant-masthead of the senior officer's ship. The fixed days for firing salutes as celebrations of anniversaries shall be as follows, viz. : (a) The anniversaries of the birth, the accession, and the coronation of the reigning sovereign ; (b) the birthday of the consort of the reigning sovereign ; on which days a royal salute shall be fired at noon from all her Majesty's ships in port, and from all the forts and batteries from which triumph salutes are usually fired.

It is illegal, by the ancient usage of England, for any private ship to make use of the ensign or other flags of the royal Navy. On the union with Ireland, 1801, a certain ensign was appointed to be used by all merchantmen in the United Kingdom, and no ensign or flag of the royal Navy was to be employed by them without special permission. See 'The Minerva,' 3 *Rob.*, 34 ; *R. v. Miller*, 1 *Hagg. R.*, 197 ; and *R. v. Benson*, 3 *ibid.*, 96, which reports that in 1833 a master of a British merchantman was condemned in the penalty of 50*l.* and costs for wearing a red pendant at the main peak. The pendant was seized by an officer from a British man-of-war, who came on board for that purpose.

It is enacted by 17 and 18 Vict. c. 104, s. 105, that 'if any colours usually worn by her Majesty's ships, or any colours resembling those of her Majesty, or any distinctive national colours, except the red ensign usually worn by merchant ships, or except the union-jack with a white border, or if the pendant usually carried by her Majesty's ships, or any pendant in any wise resembling such pendant, are, or is, hoisted on board any ship or boat belonging to any subject of her Majesty without warrant for so doing from her Majesty, or from the Admiralty, the master of such ship or boat, or the owner thereof if on board the same, and every other person hoisting, or joining, or assisting in hoisting the same, shall for every such offence incur a penalty not exceeding 500*l.*, and it shall be lawful for any officer on full pay in the military or naval service of her Majesty, or any British officer of the Customs, or any British Consular officer to board any such ship or boat and to take away any such jack, colours, or pendant, and such jack, colours, or pendant shall be forfeited to her Majesty.'

Sir H. Jenner said (*Evidence before Select Committee of House of Commons on Admiralty Courts*, p. 35) that the offence of wearing illegal colours was within the jurisdiction of the Court of Admiralty, but that in

on the high seas the flag of other foreign ships ; conforming nevertheless to the customs peculiar to the fleet to which the vessels which he may meet belong, and taking care beforehand that the salute will be returned.

2. The commander may equally, according to the rules established in France, salute the chief diplomatic officers of foreign States who come on board.

3. French ships of war may salute the country on their arrival in a foreign port, and as soon as they have ascertained that the salute will be returned gun for gun.

4. The same salutes shall be made to the ships of war at the same anchorage.

5. When a French vessel of war receives a salute from a foreign vessel of war, she is bound to return a salute of the same number of guns without considering the equality of the rank of the commanders.

6. When the salute is made by a merchantman it ought to be returned by at least two guns.

7. Personal salutes are not obligatory, except in observing, as far as they are concerned, the customs of the country where the ship may be.¹

**Regula-
tions
of Spanish
navy**

§ 26. Spanish legislation, with respect to maritime ceremonial, conforms in principle to the rules adopted by other maritime Powers. In regard to salutes from Spanish ports to foreign vessels, by royal orders of August 15, 1741 ; of July 2, 1770 ; of December 5, 1776, and of March 30, 1838, it is provided that, without changing the established usage of each port, foreign vessels of war which salute first are to be saluted in return, gun for gun. With respect to Spanish vessels entering foreign ports, the *ordenanzas* of 1793 direct that the chiefs of vessels or squadrons shall, before entering, inform themselves of the practice observed there, and that they will salute on ascertaining that it will be returned gun for gun ; and that, if no custom has been established, they will enter into an agreement for such

case of a fair ground of excuse or palliation the penalty was not sued for. But it is questionable whether the penalty, if sued for under the above statute, should not be enforced by the Attorney-General, and in the Courts of Common Law.

¹ Ortolan, *Diplomatie de la Mer*, tom. i. pp. 342-344 ; De Cussy, *Droit Maritime*, liv. i. tit. ii. § 62 ; Calvo, *Droit International*, t. i. lib. v. p. 407.

exchange of salutes, both in going into and coming out of foreign ports. By the same *ordenanzas* and royal order of February 7, 1799, it is directed that Spanish vessels, meeting other vessels on the high seas, or in foreign ports, are not to salute, nor to require a salute; but, if they should be saluted, they are to return it, gun for gun. Foreign vessels of war in Spanish ports are to salute only those of their own nation. By royal orders of January, 1826, and September 7, 1828, it is directed that Spanish ports, in which there are foreign vessels, shall, on the birthdays of such foreign sovereigns, make the same salutes and demonstrations as are made on the birthday of Spanish sovereigns, provided that such foreign vessels extend the same courtesies on such Spanish festival occasions.¹

§ 27. The military regulations for the government of the army of the United States determine, with great minuteness, the salutes and military honours to be paid by troops and forts to civil, military, and naval officers, according to the rank of each. Thus, a national salute is determined by the number of States composing the Union, at the rate of one gun for each State. The President of the United States alone is to receive a salute of twenty-one guns; the Vice-President seventeen guns; the heads of the executive departments of the federal government, the commanding general of the army, and the governors of States and territories, within their respective jurisdictions, fifteen guns; major-generals and ministers to foreign States, thirteen guns; brigadier-generals, eleven guns; and officers of the navy, according to their relative rank with officers of the army. The President and Vice-President of the United States are to be received by troops with standards and colours drooping, officers saluting, drums beating, and trumpets sounding. The compliments of other officers of government are varied according to the rank of each.²

Regula-
tions of
U.S. army
and navy

¹ Riquelme, *Derecho Pub. Int.*, lib. i. tit. ii. ch. xi. ; *Ordenanzas de la Armada*, passim ; Calvo, *Droit International*, tit. l. liv. v.

² *U. S. Army Regulations*. By the Regulations for the Navy of the United States, 1876, it is ordered that a foreign sovereign, or the chief magistrate of any foreign republic, when visiting a vessel of the navy, shall be received with the honours prescribed for the President, except that the flag of his country shall be displayed at the main, and the band shall play his national air. Members of a royal family, when visiting a vessel of the navy, shall receive the same honours as would

Difficulties in the application of rules

§ 28. These rules, however just and proper in themselves, sometimes give rise to serious questions in their application

be paid to their sovereign, except that one salute only shall be fired on leaving. In addition to the foregoing, yards may be manned for the President of the United States, a foreign sovereign or chief magistrate, and for members of a royal family. Whenever a minister appointed to represent the United States abroad, or a minister of a foreign country, shall visit a vessel of the navy, he shall be received by the admiral, commodore or commanding officer, and the marine guard shall be paraded. A salute of fifteen guns shall be fired on his leaving. A chargé d'affaires, or commissioner, shall be received in the same manner, but the salute shall be eleven guns. A consul-general shall be received by the commanding officer, and saluted with nine guns. A consul shall be received by the commanding officer, and saluted with seven guns. A vice-consul or a commercial agent shall be received by the commanding officer, and saluted with five guns.

No salute is ever to exceed twenty-one guns ; all salutes must be fired between sunrise and sunset, and the national colours must always be displayed at the time. On the occasion of a visit by any person entitled to one salute, such salute shall be fired on his leaving a vessel, or on his arrival at a navy-yard or station. If a vessel on Sunday join a commanding officer who is entitled to a salute, it is not to be fired until the following morning, immediately after hoisting the colours.

In saluting any personage, whether civil, naval, or military, the ensign of his nation is not to be exhibited, if its display will involve a return of the salute. Such salutes shall be regarded as personal, and their return shall not be expected. The same functionary shall not be saluted by the same vessel, at the same place, oftener than once in twelve months, except when it may be necessary in cases of foreign officials, or of naval or military officers who may have been advanced in rank.

Vessels of the United States shall salute flag-ships of other nations in amity with us, on meeting them at sea, in our own or in foreign ports, when commanded by an officer superior in rank to the officer of the United States, on being assured of receiving gun for gun in return. Should it occur that any foreign official of high rank or distinction, whose reception has not been provided for in the foregoing paragraphs, should visit any vessel or naval station of the United States, he may be received with the salutes and honours assigned to him by his own country. Vessels of the navy are not to salute any functionary of the United States in a foreign port until the proper honours have been paid to the flag of the nation to which the port belongs, unless such honours have been declined. The sails shall be furled, and hammocks or clothes, if up, piped down whenever a salute is fired. Whenever a vessel of the navy of the United States enters a foreign port, she will, after saluting the national flag of that port, and after the usual civilities have been extended by the naval vessels of other nations anchored in the port, salute the distinctive flags of such vessels if of superior or equal rank with that borne by the vessel of the United States, commencing with that of the nationality of the port visited, if such be flying, and continuing with other nationalities, according to the rank of their distinctive flags, displaying the national flag of the flag-officer saluted at the fore. When a foreign vessel of war of a nation in amity with the United States arrives in a port of the United States, or in a foreign port where one or more vessels of the United States are anchored, the senior officer in command will send an officer without delay to make the usual offer of civilities and assistance ; and should the distinctive flag of the vessel arrived be superior to that worn by the senior officer of the United States present, it shall be saluted in accord-

to particular cases. Thus, should a *commodore* or *flag-officer*, who is the highest officer in the United States navy, receive the same honours as a British or French *admiral*, who has the same command, or only such as are due to a British or French *commodore*, who, although enjoying the same title, has an inferior command, and is, in fact, of inferior rank? Again, is a *general* of the highest rank in the United States army to receive the same honours as a British or French *marshal*, or only those of an inferior officer, who has the same title of general? Again, if a foreign sovereign prince should visit an American ship of war in one of his own ports, should he receive only the honours which such ship pays to the President of the United States, or the honours, perhaps much higher, which would be due to him from one of his own ships? Such questions, although relating to mere matters of etiquette and ceremony, are sometimes of considerable importance, as promoting or disturbing relations of friendship. Where not arranged by some international agreement, they should be settled in each case by a mutual understanding, entered into beforehand, between the immediate parties who give and receive the salutes; and where no such agreement can be made, it is proper to abstain from all salutes, visits, and ceremonies.

A dispute of this kind, with respect to relative rank, occurred in the anchorage of Sacraficios, Mexico, between
ance with its rank after the national salute has been made by the vessel arriving and has been returned.

Vessels of the navy may participate in celebrating the national festivals of a country, while lying in one of its ports, by hoisting the ensign of that country at either the fore or main, as circumstances may require, dressing ship and firing salutes; and they may also participate in a similar way, while lying in a foreign port, in celebrating the national festivals of any other country in amity with the United States, besides the one to which the port belongs, if invited so to do. In such cases the colours shall be hauled down with those of the foreign ships, or forts, whose national festival is celebrated. And in case of foreign vessels of war lying in our ports and celebrating their national festivals, the commander of the station, or senior officer present, may participate in the celebration, as provided for when lying in a foreign port. Commanding officers of vessels of the navy, when in foreign ports, are to give timely information to the public authorities of such ports, and to the commanding officers of foreign vessels of war present, of any anniversary or other event which it is intended to celebrate; and should they fire salutes in honour of the occasion, the salutes are not to be returned unless the failure to do so would give offence, but a message of acknowledgment and thanks is to be promptly sent to them and to all others who may have publicly displayed any mark of honour or respect on the occasion.

Vice-Admiral Baudin, commanding the French ship 'La Néréide,' and Commodore Shubrick, commanding the American sloop 'Macedonian.' A similar difficulty, with respect to salutes, occurred at Toulon, in 1830, between Vice-Admiral de Rigny, commanding the French ship 'Le Conquérant,' and the captain of an English frigate.¹

It is hardly probable that different nations will ever assign the same names or grades to the officers of the same command, either upon land or in their respective naval forces. Difficult and embarrassing questions of rank and precedence will, therefore, necessarily arise whenever they meet upon the high seas or in foreign ports. The matter of salutes and of visits has been to some extent ameliorated by the international rules already referred to.²

THE ITALIAN LAW OF PAPAL GUARANTEES, 1871.

[*This translation is made from the Italian text, and from the contemporary French text, by Mr. C. H. E. Carmichael, of the Inner Temple, Editor of 'The Law Magazine and Review,' from whose pages (No. CCXLVI.) it is, by his kind permission, extracted.*]

Victor Emmanuel II., by the grace of God and the will of the nation, King of Italy.

The Senate and Chamber of Deputies have approved.

We have sanctioned and do promulgate as follows :—

TIT. I.

Prerogatives of the Supreme Pontiff, and of the Holy See.

ART. I. The person of the Supreme Pontiff is sacred and inviolable.

ART. II. Attempts against the person of the Supreme Pontiff, and incitement to such attempts, are punished with the same penalties as are enacted (*stabilite, établies*) in the case of attempt and incitement against the person of the King. Public offences and insults (*injurie, injures*) committed directly against the person of the Pontiff by word (*discorsi, paroles*), by deed or by the means enumerated (*indicati, indiquées*) in Art. I. of the Press Law are punished with the penalties enacted in Art. XIX. of that law. The above offences (*reati, délits*) are public offences (*d'azione pubblica, d'action publique*) and within the jurisdiction (*competenza, du ressort*) of the Court of Assize. Discussion on religious matters is perfectly free.

ART. III. The Italian Government renders sovereign honours to the Supreme Pontiff within the territory of the kingdom, and continues to

¹ Blanchard et Dauzats, *Relation de l'Expédition F. au Mexique*, pp. 583–585; *Reports of the Sec. of the Navy, Cong. Doc.* 1841, &c.; Klüber, *Droit des Gens*, § 121; Nau, *Völkerseerecht*, § 143; Heffter, *Droit International*, § 197; Ortolan, *Diplomatie de la Mer*, liv. ii. ch. xv.

² *Suprà*, §§ 20, 22.

him (*gli mantiene, lui conserve*) the pre-eminence of honour allowed to him (*riconosciutegli, reconnues*) by Catholic sovereigns. The Supreme Pontiff is at liberty (*ha facoltà, a la faculté*) to keep up the accustomed number of guards about his person, and for the custody of the palaces, without prejudice to the obligations and duties laid upon such guards by the existing laws of the kingdom.

ART. IV. There is preserved in favour of the Holy See the endowment (*dotazione, dotation*) of an annual income (*rendita, rente*) of 3,225,000 francs (*lire*). By means of this sum, equal to that inscribed on the Roman Budget (*bilancio, budget*) under the titles Sacred Apostolic Palaces, Sacred College, Ecclesiastical Congregations, Secretariate of State, and Diplomatic Body abroad (*Ordine Diplomatico all' estero*), it is intended to make provision for the income (*trattamento, traitement*) of the Holy Father and for the various ecclesiastical needs of the Holy See, for ordinary and extraordinary maintenance of order, and for the custody of the palaces and their dependencies; for the salaries (*assegnamenti, honoraires*), presents (*giubilazioni, retraites*), and pensions of the guards mentioned in the preceding Article, and of the servants (*adetti, attachés*) of the Papal Court, and incidental expenses (*spese eventuali, dépenses éventuelles*); as well as for the ordinary maintenance and custody of the annexed Museums and Library, and for the salaries and pensions of those employed there. The endowment (*dotazione, dotation*) above recited shall be inscribed in the Great Book of the Public Debt, in the shape of a perpetual and inalienable income in the name of the Holy See, and during the vacancy of the See it shall continue to be paid to supply all the needs of the Roman Church during that interval. It shall remain free from every kind of tax or burden, Governmental, Communal, or Provincial, and shall not be liable to diminution, even if hereafter the Italian Government should resolve to take upon itself the expenses connected with the Museums and Library.

ART. V. Besides the endowment (*dotazione, dotation*) decreed in the preceding Article, the Sovereign Pontiff continues to enjoy the Apostolic Palaces of the Vatican and Lateran, with all the buildings, gardens, and grounds annexed thereto, and dependent thereon, besides the Villa of Castel Gandolfo, with all its appurtenants and dependencies. The said Palaces, Villas, and their dependencies, as also the Museums, the Library, and the artistic and archæological collections therein, are inalienable, free from all tax or burden or expropriation for public utility.

ART. VI. During the vacancy of the Holy See no judicial or political authority shall in any way whatsoever hinder or limit the personal liberty of the Cardinals. The Government undertakes to prevent any external violence from troubling sittings of the Conclave and of Œcumenical Councils.

ART. VII. No public officer or agent of police (*agente della forza pubblica, agent de la force publique*) shall have the power, in the exercise of the functions of his office, to introduce himself into the palaces and places habitually or temporarily resided in by the Pope, nor into any place where a Conclave or an Œcumenical Council may be assembled, unless authorised by the Pope, the Conclave, or the Council.

ART. VIII. It is forbidden to search or make perquisitions in the offices of the Pontifical administrations or congregations, which are invested with a purely spiritual character, or to seize any of their papers, documents, books, or registers.

ART. IX. The Pope is absolutely free to exercise all the functions of his spiritual ministry, and to post up (*fare affiggere, faire afficher*) all acts emanating therefrom on the doors of the basilicas and churches of Rome.

ART. X. Those ecclesiastics who by reason of their charges take part

in Rome in the acts of the spiritual ministry of the Holy See, shall not, in consequence of such acts, be subject to any investigation or control (*sindacato, contrôle*) on the part of the authorities (*autorita pubblica, autorité publique*). Every foreigner invested with an ecclesiastical office in Rome shall enjoy the personal guarantees secured to Italian citizens in virtue of the laws of the kingdom.

ART. XI. The representatives of foreign Governments at the Holy See enjoy in the kingdom all the prerogatives and immunities which belong to Diplomatic Agents in virtue of international law. The Penal sections applicable to offences against the representatives of Foreign Powers accredited to the Italian Government shall be applied to offences against the said representatives.

ART. XII. The Pope corresponds freely with the episcopate and with the whole Catholic world without any interference (*ingerenza*) on the part of the Italian Government. With this view power is granted to him to establish in the Vatican, or in any other residence, post and telegraph offices, served by a staff of his own selection. The Pontifical Post-Office shall have power to correspond directly, under closed packets, with foreign Post-Offices, or to hand over its correspondence to the Italian offices. In either case, the carriage of despatches or correspondence franked by stamps of the Pontifical office, shall be exempt from all tax or charge on Italian territory. Couriers sent in the Pope's name are assimilated in the kingdom to the Cabinet couriers of foreign Powers. The Pontifical telegraph office shall be placed in communication with the telegraphic service of the kingdom at the expense of the State. Telegrams transmitted by the said office and authenticated as Papal (*Pontificii*) shall be received and sent with the privileges accorded to State telegrams, and free from all tax in the kingdom. The telegrams of the Pope, and any signed by his order, franked by the stamp of the Holy See, which may be presented at any telegraph office of the kingdom, shall enjoy the same advantages. Telegrams addressed to the Pope shall be free from all payments accustomed to be made by the recipient.

ART. XIII. In the city of Rome, and in the six suburbicarian dioceses, the seminaries, academies, colleges, and other institutions founded for the instruction and education of ecclesiastics, shall continue to be solely under the Holy See, without any interference (*ingerenza, ingérence*) on the part of the educational authorities of the kingdom.

TIT. II.

Relations of the State with the Church.

ART. XIV. All restriction of the right of assembly on the part of members of the Catholic clergy is abolished.

ART. XV. The Government renounces the right of the Apostolic Legation (*legazia*) in Sicily, and the right of nomination, or proposition in the collation, to the major benefices throughout the kingdom. Bishops shall not be required to take the oath to the King. Major and minor benefices can only be conferred on citizens of the kingdom, save in the city of Rome and the suburbicarian dioceses. No change is made as to the collation to benefices in the gift of the Crown.

ART. XVI. The Exequatur and Royal Placet are abolished, as also every other form of Government assent to the publication and execution of the acts of the ecclesiastical authorities. Nevertheless, so long as a different provision shall not have been made by the special law mentioned in Art. XVIII., the acts of the said authorities, in so far as they concern the destination of ecclesiastical property and the collation (*provista, collation*) to major and minor benefices, save in the city of Rome and the suburbicarian dioceses, remain subject to the Royal

Exequatur and Placet. The dispositions of the civil law are maintained with regard to the creation and mode of subsistence of ecclesiastical establishments and the alienation of their property.

ART. XVII. In spiritual and disciplinary matters reclamations or appeals against the acts of the ecclesiastical authorities are not admitted, and the forcible execution of such acts (*esecuzione coatta, exécution par contrainte*) is neither recognised nor allowed. The cognisance of the juridical effect of such acts, or of any other acts of the said authorities, belongs to the civil jurisdiction. Nevertheless, such acts are void of effect if they are contrary to the law of the State, or to public order, or if they violate individual rights, and they are subject to the penal law if they constitute a delict.

ART. XVIII. A subsequent law shall provide for the reorganisation, the conservation, and the administration of ecclesiastical property in the kingdom.

ART. XIX. Every disposition actually in force is abrogated with regard to the subject-matter of the present law, in so far as it may be contrary thereto.

We do order that the present law, confirmed (*munita, munie*) by the seal of State, be inserted in the official collection of the laws and decrees of the Kingdom of Italy, and do command all whom it concerns to obey it and cause it to be obeyed as a law of the State.

Given at Turin, May 13, 1871.

CHAPTER VI

RIGHTS OF PROPERTY AND OF DOMAIN

1. Divisions of the sovereign powers of the State—2. Prerogatives of the sovereign—3. *Jura majestatis* and *regalia*—4. Property and domain of State—5. Right of eminent domain—6. Right of a State to own property—7. Modes of acquiring property—8. Right of disposition of territory—9. Inhabitants of transferred territory—10. Examples of alienation by sale—11. By mortgage—12. By deeds of gift and bequest—13. Extent of maritime territory and territorial jurisdiction—14. Extent of the terms 'coast' and 'shores'—15. Ownership of islands—16. Principle of the 'king's chambers'—17. Difficulties in its application—18. Claims to contiguous portions of the sea—19. Danish sound dues—20. Questions of *mare clausum* and *mare liberum*—21. Black Sea, how far a *mare clausum*—22. The great lakes and their outlets.—23. Navigable rivers within or bounding on a State—24. Changes in rivers or lakes dividing States—25. Effect of such changes on boundaries—26. Navigable rivers passing through several States—27. Incidental use of their banks—28. Right of innocent passage—29. This right may be modified by compact—30. Navigation of the Rhine—31. Of other European rivers—32. Navigation of the Mississippi—33. Of the St. Lawrence.

Sovereignty of a State

§ 1. BEFORE proceeding to discuss the rights of property and domain, it may be proper to define what is understood by the property and domain of a State, as distinguished from the rights of sovereignty, and the powers and prerogatives of the sovereign or ruler.

As remarked in a preceding chapter, the *sovereignty* of a State is the collection of the wills and powers of all the individual members of which the State is composed. According to Grotius, Puffendorf, and more modern text-writers, this power has two subjects—*common* and *proper*,—the former being the State itself or the community which constitutes the State, and the latter the person or persons in whom, by the organic laws, the power is vested; the former, being the source, is one and indivisible, while the latter may be one or many, and is frequently divided into *legislative*, *executive*, and *judicial*, each branch or division being separate and distinct, and sometimes entirely independent. The *sovereignty* of a

State is, therefore, its public power or authority, and the *sovereign* is the person, or body of persons, who are invested with that power or authority. If that power or authority remains in the community, the *common* and *proper* subjects are one and the same, and the government is a *democracy*; if vested in a number of individuals, it is an *aristocracy*; if in a single person, it is a *monarchy*. These simple forms are modified and varied according to the organic laws of each State.¹

§ 2. The term *prerogative* is frequently used to express the Prerogative uncontrolled will of the sovereign power in the State. It is applied not only to the king, but also to the legislative and judicial branches of a government, as the 'royal prerogatives,' the 'prerogatives of parliament,' the 'prerogatives of the court. Rutherford says, prerogative simply means a power or will which is discretionary, and above and uncontrolled by any other will, and that, if this power be limited in any respect, so far the prerogative is at an end. In speaking of the royal prerogative, Blackstone says: 'It signifies, in its etymology (from *prae* and *rogo*), something that is required or demanded before or in preference to all others.' And hence it follows that it must be in its nature singular or eccentric; that it can only be applied to those rights and capacities which the king enjoys alone, and in contradistinction to all others, and not to those which he enjoys in common with his subjects; for if once any one prerogative of the Crown could be held in common with the subject, it would cease to be prerogative any longer. And, therefore, Finch lays down as a maxim, that the prerogative is that law, in the case of the king, which is law in no case of the subject. He further says (l. 84, 85): 'The king has a prerogative in all things that are not injurious to the subject; for in them all it must be remembered that the king's prerogative stretcheth not to the

¹ Grotius, *De Jur. Bel. ac Pac.*, lib. i. cap. iii. §§ 6, 7, 17; Puffendorf, *De Jur. Nat. et Gent.*, lib. vii. cap. ii. § 20; cap. iv. § i.; cap. v. § 1; Bowyer, *Universal Pub. Law*, pp. 210-216; Vattel, *Droit des Gens*, liv. i. ch. i. §§ 1, 3; Garden, *De la Diplomatie*, tom. i. pp. 106, 110; Martens, *Précis du Droit des Gens*, § 23; Rayneval, *Institutions du Droit*, tom. i. p. 44; Ortolan, *Diplomatie de la Mer*, tom. i. pp. 11, 12; Wheaton, *Elem. Int. Law*, pt. i. ch. ii. § 5; Ortolan, *Domaine International*, pp. 16 et seq.; Heffter, *Droit International*, §§ 16-25; Burlamaqui, *Droit de la Nat. et des Gens*, tom. iv. pt. ii. ch. v.; Merlin, *Répertoire*, verb. 'souveraineté'; Proudhon et Dumay, *Domaine Public*, tom. i. ch. vii.

doing of any wrong.' Bracton says (l. iii. t. i. c. ix.): 'Nihil enim aliud potest rex, nisi id solum quod de jure potest.' One of the prerogatives of the king being sovereignty, no suit can be brought against him; yet in England, any person, who has a just demand in point of property against the king, may ask it by means of a 'petition of right' as a matter of favour, not of right. It is an important axiom that the 'king can do no wrong,' for, if he could, there would be no means of redress. But his ministers and councillors who have wrongly advised him, or assisted him in derogation of the law of the land, are punishable by indictment and impeachment. Moreover, unconstitutional tyranny or oppression invariably furnish their own remedy, as was proved in the case of James II. Both Houses of Parliament have a right to remonstrate with the king, even concerning those acts which are personally his own. This right belongs to no individual member, but to the whole House collectively; members have been sent to the Tower of London for want of respect in this regard.¹

In the Middle Ages, there was frequently more than one law governing the population of a State. The Church had its own law, the State another, merchants their own customs, &c. The idea prevailed that the king was above all law, or had a law of his own. Thus Fleta (book ii. chap. ii.) paraphrased by Bacon in his argument for the Post Nati, records, 'If a king of England travel or pass through foreign territories, yet the allegiance of his subjects followeth him—as appeared in that notable case which is reported in Fleta, where one of the train of Edward I., as he passed through France from the Holy Land, embezzled some silver plate at Paris, and jurisdiction was demanded of this crime by the French King's counsel-at-law *ratione soli*, and demanded likewise by the officers of King Edward *ratione personæ*; and after much solemnity, contestation and interpleading it was ruled and determined for King Edward, and the party tried and judged before the Marshal of the king's house, and hanged after the English law, and execution in St. Germain's meadows.' 'Tandem consideratum fuit quod rex Angliæ illâ regiâ prerogativâ et hospitii sui privilegio uteretur et gauderet.' To this prerogative may be ascribed the doctrine of extra-

¹ *Com. Journ.*, November 18, 1685; *ibid.*, December 4, 1717.

territoriality of ambassadors and of ships of war. See *infra*, cc. vii. and x.

But the word *prerogative*, which properly signifies power or will, is sometimes applied by law-writers to the *thing* over which that power or will is exercised. Thus the king's revenue is sometimes called the king's *fiscal prerogatives*; moreover, the sources of that revenue are, by an elliptical expression, sometimes called prerogatives. Thus the rents and profits of the demesne lands of the Crown, and even the lands themselves, have been classed as prerogatives of the Crown. So of forfeited lands, mines of gold and silver, treasure-trove, waifs, estrays, &c. But these are *things* and not *powers*; they may belong to the king *by virtue* of his prerogatives, and be held by him as the property of the Crown *by virtue* of his sovereignty, as well as by any other right of property, but they are themselves neither prerogatives nor sovereignties. It is necessary to bear in mind the distinction between the right of property, or property itself, and the origin or source of that right.¹

§ 3. The word *majestas* was used by the Romans to express the supreme dignity of the commonwealth, and hence *majestas*, as employed by the civilians, is a legal term signifying *the sovereign dignity of the State*; and the different powers of the State, or parts of sovereign power, are called by them *jura majestatis*. They very properly distinguish between things, and rights to things, the former being called *corpora*, and the latter *jura*. 'Upon the breaking up of the Roman empire,' says Gamboa, 'the princes and cities, which declared themselves independent, appropriated to themselves those parts in which nature, most rich and liberal, yields extraordinary products. These portions, or reserved rights, were called *regalia*.' The same writer, in other places, applies the term *regalia* both to rights to things, and to the things

*Jura
majestatis
and
regalia*

¹ Rutherforth, *Institutes*, b. ii. ch. iii. § 10; Blackstone, *Commentaries*, vol. i. pp. 239 et seq.

Vattel says, *Droit des Gens*, lib. i. ch. x. § 108, that it is an encroachment on the prerogative of a State for another State to counterfeit its coin, or to protect false-coiners who dare to do so. See also 24 and 25 Vict., c. 99, § 18, against counterfeiting foreign coin in England.

In 1870 her Majesty Queen Victoria, by order in Council, and in accordance with the wishes of Parliament, surrendered the ancient prerogative of government of the Army. By this step the General Commander-in-Chief becomes a subordinate of the Minister of War.

themselves—to *jura* and *corpora*. So of the feudal and English law-writers. They sometimes apply this term to things, as the crown, and sceptre, and royal and church lands, and sometimes to the dignity, power and pecuniary rights of the king. When applied to the power and dignity of the king, they are called *majora regalia*, and when applied to his fiscal rights, they are called *minora regalia*. The former, says Erskine, are not alienable without the consent of parliament, while the latter may be communicated to his subjects by the sovereign himself, at his pleasure. The term *regalia*, therefore, differs from sovereignty, or *jura majestatis*, as being applicable both to things and to rights to things—*corpora* and *jura*—and, also, as not being inherent to or inseparable from the sovereign power, for *regalia* may be alienated, either with or without the consent of parliament. It may be applied to the rights and prerogatives, not only of the king, but also of the church, the treasury, the courts, and parliament, and also to property of the State, of the church, &c. And when applied to property, it may include both that which necessarily appertains to the Crown, and that which is alienable, or which may be passed to individual subjects.¹

**Property
and
domain**

§ 4. By the term *property* we understand the ownership of a thing, or the exclusive right of possessing, enjoying, and disposing of it. Things owned by individuals, or corporate bodies, are termed *private property*, and those owned by the State are called *public property*, or the property of the State. The property of a State is, therefore, very different from its sovereignty, or the prerogatives of its ruler. In speaking of real property, whether of individuals or of States, the term *domain* is frequently used. 'A distinction,' says Bouvier, 'has been made between *property* and *domain*. The former is said to be that quality which is conceived to be in the thing itself, as it is considered as belonging to such or such person exclusively of all others. By the latter is understood that right which the owner has of disposing of the thing. Hence, domain and property are said to be correlative terms; the one is the active right to dispose, the other a passive quality,

¹ Gamboa, *Commentarios*, cap. ii. §§ 4, 16, 21, 24; Dou, *Derecho Público General*, lib. i. tit. ix. cap. v.; Erskine, *Institutes*, pp. 323 et seq.; Merlin, *Rép. de Jurisprudence*, verb. 'droits régaliens.' See 1 *Anne*, ch. vii. s. 5 (Ruff. edition), as to what Crown property is rendered incapable of alienation; also Doe d. R. v. York, 14 Q.B., 81.

which follows the thing and places it at the disposition of the owner. But this distinction is too subtle for practical use.' The term domain, as applied to the property of a State, is divided by Proudhon into two classes: 'the *public* domain, which applies to that kind of property which the government holds as a mere trustee for the use of the public, such as public highways, navigable rivers, salt springs, &c., and which are not, as of course, alienable;¹ and the domain *of the State*, which applies only to things in which the State has the same absolute property as an individual would have in like cases.' Although these particular terms are not in general use with us, we nevertheless distinguish between the terms 'public lands' and lands which have been purchased or reserved for any particular use of the government, or of one of its departments, for laws relating to 'public lands' do not apply to lands so purchased or reserved. Ortolan distinguishes between the property which the State holds by virtue of its interior laws, and that which it holds by virtue of its international rights under the law of nations. The right of the State to the former is said to be *absolute*, as against everybody, while its right to the latter may be absolute only as against other States, and merely *paramount* when considered with respect to its own members and their rights of property in the same things. The former, Ortolan calls *the private or public domain of the State* ('domaine privé, ou domaine public de l'état'), and the latter he calls *international domain*, or *property between States* ('domaine international, ou propriété d'état à état').²

§ 5. The term *dominium*, as used by the civilians, when

¹ 2 *Feud.*, t. 56; *Crag.*, t. xv. 15. In England also it is for the king to assign all *legal ports*, which are the gates of the realm. In the reign of King John a ship was seized for putting in at a place which was not a legal port (*Maddox, Hist. Exch.*, § 30). A court of Port-Mote is incident to every legal port, 4 *Inst.*, 148. See also 4 Hen. IV., c. 20; 1 Eliz., c. 11; 13 and 14 Car. II., c. 11; 46 Geo. III., c. 153; 39 and 40 Vict., c. 36. Further, in England, the king has the right of erecting all lighthouses, beacons, and seamarks. *Rob. Claus.*, 1 Ric. II., m. 42; *Sid.*, 158; 4 *Inst.*, 149. The 8 Eliz., c. 13, empowered the Corporation of the Trinity House to erect beacons, &c., and this statute has been since held to extend to lighthouses. See 17 and 18 Vict., c. 140, § 389; *McCulloch, Com. Dic.*, titt. 'Lighthouse,' 'Trinity House.'

² Proudhon et Dumay, *Domaine Public*, tom. i. chs. xiv., xx.; Ortolan, *Domaine International*, §§ 13 et seq.; Rutherford, *Institutes*, vol. ii. ch. ix. § 6; *American Jurist*, No. 37, p. 121; Bouvier, *Law Dictionary*, verb. 'domaine'; Crittenden, *Opinions U. S. Attys.-Genl.*, vol. v. p. 578; Cushing, *Opinions U. S. Attys.-Genl.*, vol. vi. p. 670; Wilcox v. Jackson 13 *Peters. R.*, 513.

Right of
eminent
domain

applied to property, has several significations. Erskine says : 'The interest which the superior retains to himself in all feudal grants is called *dominium directum*, because it is the highest and most eminent right, and that which the vassal acquires goes under the name of *dominium utile*, as being subordinate to the other.' The full and absolute ownership, *dominium plenum*, includes both the *directum* and the *utile*. The term *dominium eminens* is not, properly speaking, property, but a right of the State *over* the property of individuals. It is defined in Cooper's Justinian, 'the right of the public, in cases of emergency, to seize upon the property of individuals, and convert it to the public use.' Bowyer says, the *jus eminens* 'is that right which the entire body has over the members and whatever belongs to them, and which, being for the common good, is superior to the private rights of individuals belonging to their private interests. This *jus eminens* is called by writers on public law *dominium eminens*, when it regards *property*. It is the right of the State, or the sovereign power, over property within it, when necessity or the public good requires. This is the true foundation of the right of taxation.' Again, he says the right called *dominium eminens* 'is a part of the sovereign authority, and one of the *jura majestatis*.' Vattel defines *dominium eminens*, or *eminent domain*, to be, 'the right which belongs to the society or the sovereign, of disposing, in case of necessity and for the public safety, of all the wealth contained in the State.' But this definition is obviously defective and incorrect. Chancellor Walworth says : 'All separate interests of individuals in property are held of the government,' and 'notwithstanding the grant to individuals, the *eminent domain*, the highest and most exact idea of property, remains in the government, or in the aggregate body of the people in their sovereign capacity, and they have a right to resume the possession of the property in the manner directed by the constitution and laws of the State, whenever the public interest requires it. This right of resumption may be exercised not only where the safety, but also where the interest, or even the expediency of the State is concerned ; as where the land of the individual is wanted for a road, canal, or other public improvement.'

It is seen, from these definitions, that the term *eminent domain* is applied to one of the *jura majestatis*; it is that

highest right over property which is in the government, and is never granted to the individual, and, therefore, is essentially different from what is ordinarily understood by the word property. The term *eminent domain*, properly speaking, is not applicable to the property of the State, but only to the property of individuals, for the right of the State to dispose of its property results from its right of ownership, and not from the right of eminent domain, which latter right remains in the State after it has transferred the ownership of its property. It is a right which, from its very nature, is inseparable from the sovereignty, and is necessarily transferred with the sovereignty.¹

§ 6. A State being regarded in public law as a body politic, or distinct moral being, naturally sovereign and independent, it is considered as capable of the same rights, duties and obligations, with respect to other States, as individuals with respect to other individuals. Among the most important of these natural rights is that of acquiring, possessing, and enjoying property. And this right applies not only to property of the State, as exclusive of other States, but to such property as exclusive of individuals. But international law generally considers only the former kind of property, or international domain. When, however, we consider the rights of conquest and cession, the rights of maritime capture and of capture on land, it becomes necessary to consider the interior or municipal rights of property in the State, and to distinguish between the absolute and paramount rights of the State, in respect to property considered in its interior relations under municipal laws, rather than its exterior relations under international laws. As a general rule, the property of a State, of whatsoever description, is marked by the same characteristics relatively to other States, as the property of individuals, relatively to other individuals; that is to say, 'it is exclusive

Right of a
State to
own
property

¹ Erskine, *Institutes*, pp. 231, 312; Cooper, *Justinian*, p. 442; Bowyer, *Universal Public Law*, pp. 227, 372; Vattel, *Droit des Gens*, liv. i. ch. xx. § 244; Domat, *Des Lois Civiles*, lib. i. tit. ii. § 13; Sedgewick, *Stat. and Con. Law*, pp. 500 et seq.; Beekman v. S. S. R. R. Co., 3, *Paige R.*, p. 73; Varrick v. Smith, 5 *Paige R.*, p. 159; Pollard's Lessee v. Hagan, 3 *Howard Rep.*, p. 223; Bello, *Derecho Internacional*, pt. i. cap. iv. § 1; Riquelme, *Derecho Público Int.*, lib. i. tit. i. cap. ii.; Burlamaqui, *Droit de la Nat. et des Gens*, tom. iv. pt. ii. ch. v.; Gilmer v. Lime Point, *Cal. Rep.*, April term, 1861; *American Law Reporter*, vol. xix. pp. 254 et seq.

of foreign interference, and susceptible of free disposition.¹

Modes
of ac-
quisition

§ 7. A State may acquire property or domain in various ways : its title may be acquired originally by mere occupancy, and confirmed by the presumption arising from the lapse of time ; or by discovery and lawful possession ; or by conquest, confirmed by treaty or tacit consent ; or by grants, cession, purchase, or exchange ; in fine, by any of the recognised modes by which private property is acquired by individuals. It is not our object to enter into any general discussion of these several modes of acquisition, any further than may be necessary to distinguish the character of certain rights of property which are the peculiar objects of international jurisprudence.²

Right of
disposi-
tion of
territory

§ 8. A sovereign State has the same absolute right to dispose of its territorial or other public property as it has to acquire such property, but it depends upon its own municipal constitution and laws how, and by what department of its government, the disposition shall be made. This is sometimes a question of peculiar interest to foreign States, who may acquire such property by purchase, exchange, cession, conquest, and treaties of confirmation, and especially where such acquisitions are made from States continually subject to revolutions and fluctuations in the character of its government and in the powers of its rulers. The act of a government *de facto*, a government which is submitted to by the great body of the people, and recognised by other States, is binding as the act of the State ; and it is not necessary for others to examine into the origin, nature, and limits of that authority. If it is an authority *de facto*, and *sufficient* for the purpose, others will not inquire how that authority was obtained.³

§ 9. Nevertheless, in order to make such transfer valid, the

¹ See also remarks in ch. vii. § 25 *infra*.

² Wheaton, *Elem. Int. Law*, pt. ii. ch. iv. §§ 1, 4, 5 ; Puffendorf, *De Jure Nat. et Gent.*, lib. iv. chs. iv. v. vi. ; Moser, *Versuch.*, &c., b. v. cap. ix. ; Schmaltz, *Droit des Gens*, liv. iv. ch. i. ; Kluber, *Droit des Gens*, §§ 125, 126 ; Burlamaqui, *Droit de la Nat. et des Gens*, tom. iv. pt. iii. ch. v.

³ Phillimore, *On Int. Law*, vol. i. §§ 150, 283 et seq. ; Kent, *Com. on Am. Law*, vol. i. p. 166 ; Webster to De la Rosa, Aug. 25, 1851 ; Cong. Doc., 32nd Cong. 1st sess. Senate Ex. Doc. No. 27 ; Bello, *Derecho Internacional*, pt. i. cap. iv. § 2 ; Heffter, *Droit International*, § 71 ; Riquelme, *Derecho Púb. Int.*, lib. i. tit. i. cap. 2.

authority, whether *de facto* or *de jure*, must be competent to bind the State. Hence the necessity of examining into and ascertaining the powers of the rulers, as the municipal constitutions of different States throw many difficulties in the way of alienations of their public property, and particularly of their territory. Especially, in modern times, the consent of the governed, express or implied, is necessary, before the transfer of their allegiance can regularly take place. But formerly, what Grotius calls *patrimonial kingdoms* were considered in the light of absolute property of particular families, who, having received the blind submission of their subjects, sold and bartered them away, like any other property which they possessed. And such transfers of sovereignty included, not only the right of *eminent domain*, and the absolute property of the sovereign or State, but all private lands, and the property and services of the subjects, who were transferred with the soil, in the same manner as a slaveholder may transfer his slaves and all they possess, together with the title to his plantation.¹

Authority
to make
a valid
transfer

§ 10. There are numerous examples of such treaties of sale. In 1301, Theodoric, Landgrave of Thuringia, sold the Marquisate of Lusatia to Burchard, Archbishop of Magdeburg, for 600 marks of silver—'insuper cum ministerialibus, vassalis et mancipiis, et aliis hominibus cujuscunque conditionis in jam dicta terra commorantibus,' &c. In the same manner, in 1311, Dantzic, Derschovia and Swiecae were sold by the Margrave of Brandenburg to the Grand Master of the Teutonic Order, for 10,000 marks. In 1333, the city and territory of Mechlin was transferred for one hundred thousand reals of gold, by a treaty of sale between its Sovereign and the Earl of Flanders, the fealty being reserved. About the same time the city and county of Lucques were sold by John of Luxemburg to Philip of Valois, for 180,000 florins; and a few years after, the sovereignty of Frankenstein was sold by the Duke of Silesia, for 2,000 marks, to the King of Bohemia. The sovereignty which the Popes so long held over Avignon was purchased by Clement VI., for 80,000 florins, from Jane, Queen of Naples and Countess of Provence.² Alaska was

Patri-
monial
kingdoms

¹ Grotius, *De Jure Bel. ac Pac.*, lib. iii. ch. xi.

² Ward, *Law of Nations*, vol. ii. pp. 256-260; Dumont, *Corps Dip.*, liv. ii. pp. 330, 364, 365; Dupuy, *Droits de Roy F. C.*, p. 70; Leibnitz, *Cod. Dip.*, p. 200.

purchased from Russia by the United States, by treaty of March 13, 1867.

Inhabit-
ants of
such
kingdoms

§ 11. The practice also extended to the mortgaging of sovereignties, and the sales of reversionary interests in kingdoms. Thus, Robert, Duke of Normandy, in order to raise money to engage in the first crusade, mortgaged his duchy for 666 lbs. weight of silver to his brother William, and transferred the possession before his departure for the Holy Land. In 1479 Louis XI. bought the right of the house of Pen-thièvre, the next male heirs in reversion, to Brittany. And fifteen years later Charles VIII. purchased, for an annual pension of 4,300 ducats, an estate of 5,000, in lands in France or Italy, and the disposition of the Morea (when conquered), of Paleologus, the nephew of Constantine, the last Christian Emperor, his right to the whole Empire of Constantinople. The act of sale being drawn up by two notaries, and ratified, Charles assumed the robes and ornaments of the imperial dignity, and made no scruples in claiming the imperial rights vested in him by virtue of this purchase.¹

Modern
transfers

§ 12. It was also the custom to dispose of sovereignties and dominions by deeds of gift, and by bequests. The Emperor Lewis V. created the dauphin Humbert *king*, with the full privilege of disposing of his sovereignty at will, during life, or at his death. In 1343 Humbert ceded his dominions to Philip of Valois, by solemn deed of gift. By similar deeds, and upon a like principle, the Emperor Henry VI. conferred upon Richard I. the kingdom of Arles, and the Emperor Baldwin gave to the Duke of Burgundy the kingdom of Thessalonica. By bequests not only were whole sovereignties disposed of, but the orders of succession were frequently changed. Thus Charles II., King of Sicily and Count of Provence, changed by will the order of succession to the county, and the claims of Charles VIII. to the throne of Naples were founded upon the adoption of Louis of Anjou, by Jane, Queen of Naples, 1380, which was evidenced to all Europe by a solemn and public deed.² In 1544 the English Parliament declared the succession to the Crown, but omitted to make any arrangement in the case of failure of issue of the

¹ Russell, *Hist. Modern Europe*, vol. i. pp. 185, 472 ; White, *Hist. of France*, p. 208.

² Leibnitz, *Cod. Dip.*, pp. 51, 237, 158, 220, 382 ; Pfeffel, *Droit Pub. d'Allemagne*, tom. i. p. 541 ; Hénault, *Hist. Chron.*, tom. i. p. 315.

children of Henry VIII. The King, *by his will*, named the descendants of his sister Mary, Duchess of Suffolk, as heirs in case of such failure.

§ 13. National territory consists of water as well as land. Maritime
territory
and ter-
ritorial
juris-
diction
The maritime territory of every State extends to the ports, harbours, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands belonging to the same State. Within these limits its rights of property and territorial jurisdiction are absolute, and exclude those of every other State. Bynkershoek says: 'Hinc videas priscos juris magistros, qui dominium in mare proximum ausi sunt agnoscere, in regundis ejus finibus admodum vagari incertos. . . . Quare omnino videtur rectius, eo potestatem terræ extendi, quousque tormenta exploduntur; eatenus quippe cum imperare, tum possidere videmur. Loquor autem de his temporibus, quibus illis machinis utimur; alioquin generaliter dicendum esset, potestatem terræ finiri ubi finitur armorum vis; etenim hæc, ut diximus, possessionem tuetur.' Following this principle the general usage of nations superadds to the maritime territory an exclusive territorial jurisdiction over the sea for the distance of one marine league, or the range of a cannon-shot (as above mentioned), along all the shores or coasts of the State. The maxim of law on this subject is ¹ *terræ dominium finitur ubi finitur armorum vis*, which is usually recognised to be about three miles from the shore. And even beyond this limit States may exercise a qualified jurisdiction for fiscal and defensive purposes—that is, for the execution of their revenue laws and to prevent 'hovering on their coasts.'² It

¹ The anonymous author of the poem 'Della Natura,' lib. v., expresses this idea in the following lines:—

' Tanto s' avanza in mar questo dominio,
Quant' esser può d'antemurale e guardia,
Fin dove può da terra in mar vibrandosi,
Correr di cavo bronzo accesso fulmine,'

which may thus be translated:—

' Far as the sovereign can defend his sway,
Extends his empire o'er the wat'ry way;
The shot sent thundering to the liquid plain,
Assigns the limits of his just domain.'

² The British 'Hovering Act' (9 Geo. II., c. 35) assumed a jurisdiction over four leagues from the coast, for certain revenue purposes. All provisions in that Act regarding hovering vessels were by the 47 Geo. III., sess. ii. cap. 66, extended to vessels within one hundred leagues, if they fell within the description given by the latter Act. These statutes are

is necessary to distinguish between *maritime territory* and *territorial jurisdiction*.

The question how far the law of a local State is applicable to a foreign vessel passing along or anchoring in its territorial waters has led to much divergence of opinion,¹ but it may now be considered settled that a foreign vessel which does no more

repealed, but some of their provisions, with a limitation, however, of three leagues, are re-enacted in the Customs Act, 1876 (39 and 40 Vict., c. 36). For similar provisions in the United States, see *Laws, U. S.*, vol. iv. p. 320, §§ 25, 26, 27; and p. 437, § 99. Also *Church v. Hubbart*, 2 *Cranch*, 187.

¹ The observations contained in the following references are worthy of comparison. Casaregis (*Disc. de Comm.*, § 136) says that the sovereign possessing the coast has equal sovereignty over the sea for one hundred miles, with criminal jurisdiction, the power of tolls, and of prohibition to ships from passing.

Craig (*Jus. Feud.*, lib. i. § 13, p. 140) says: 'Reges inter se quasi omnia maria diviserint . . . id mare censeatur quod alteri propinquius . . . in quo si *delictum aliquod* commissum fuerit, ejus sit jurisdictio qui proximum continentem possideat.'

Vattel (*Droit des Gens*, 288) says: 'Powers extend their dominion over the sea as far as they can protect their right. It is of importance to the safety and welfare of the State that it should not be free to all the world to come so near to its possessions, especially with ships of war. . . . But then the nation cannot refuse access to ships not suspected, or making innocent use of its waters.'

Pascal Fiore (vol. i. p. 370) says: 'Every nation has a *dominium utile* on the sea which washes its shores, in the interest of its preservation. It exercises besides a right of jurisdiction and police in the interest of its defence. . . . But publicists are not agreed as to the extent of the territorial sea, and the limit of the use (*domaine utile*) which the State may exercise.'

Hautefeuille says (*Des Droits des Neutres*, 197) that nations can 'prohibit the vessels of all other nations, or of any particular nation, from navigating territorial waters, or may prohibit the navigation for particular purposes. Foreigners entering this reserved territory must submit to the law of the sovereign in all that concerns their relations with the land and its inhabitants, as though they were on the land. The limit of the territorial sea is fixed by the principle from which its territorial character arises—as far as it can be commanded from shore.'

Ortolan says (*Diplom. de la Mer*, liv. ii. c. 8) that as soon as there is sufficient depth for navigation, nations are entitled, as of right, to the use of the sea as a means of communication, but that the territorial sea may be made use of for the defence of a country, and a State may make laws ('lois de police et de sûreté') over the same. The State has over that space, not property, but a right of empire; a power of legislation, supervision, and jurisdiction, conformably to the rules of international jurisdiction.

See also the remarks of Sir W. Scott in the 'Maria' (1 *Rob.*, 352), and the 'Twee Gebroeders' (3 *ibid.*, 162); also the 'Leda' (*Swa. Aam.*, 40); the General Iron Screw Colliery Co. *v.* Schurmanns (1 *J. and H.*, 180); the Free Fishers of Whitstable and Gann (11 C.B., *N.S.*, 387, and 2 *H. L. C.*, 192); Gammell *v.* Woods and Forests (3 *Macq.*, 419); the 'Ann' (1 *Gall.*, 62); the 'Exchange' (7 *Cranch*, 136); the Admiralty (12 *Co. Rep.*, 79); and the 21 and 22 Vict. c. 109.

than pass along the coasts of a local State in that part of the sea which forms a portion of its territorial waters is subject, while so passing along, or temporarily anchoring, to the sovereignty of such local State, insomuch that in the absence of other legislation it is bound to respect the military and police regulations adopted by the State for the safety of its territory and of the population of the coast. The vessel in other respects is as free as if it were on the high seas. But the local State has a right to legislate with respect to its territorial waters,¹ and in such case the vessel becomes subject while in the territorial waters to such local laws as may apply to it.²

By the 41 and 42 Vict., c. 73, passed by the British Parliament, August 16, 1878, an indictable offence committed by a person, whether he be or be not a subject of her Majesty, on the open sea, within such part of the sea adjacent to the coast of the United Kingdom, or to the coast of some other part of her Majesty's dominions as is deemed by international law to be within the territorial sovereignty of her Majesty, is an offence within the jurisdiction of the admiral, although it may have been committed on board or by means of a foreign ship; and the person who has committed such offence may be arrested, tried, and punished accordingly by British officials. 'Within the jurisdiction of the admiral' means, for the purposes of this Act, any part of the open sea within one marine league of the coast, measured from low-water mark. Proceedings cannot be taken under this Act without

¹ Thus by virtue of the 13 and 14 Car. II., c. 28, Great Britain appears to have claimed and exercised until 1843 the right to enforce a close time for pilchard fishery by prohibiting them to be taken 'in the high sea or in any bay, port, creek, or coast of, or belonging to, Cornwall or Devon . . . unless it be at the distance of one league and a half at least from the respective shores.' This statute is repealed by the 31 and 32 Vict., c. 45. See also chs. vii., x., §§ 13 et seq.; Grotius, *De Jure Bel. ac Pac.*, lib. ii. cap. iii. § 10; Bynkershoek, *Quæst. de Jure Pub.*, lib. i. cap. viii.; Bynkershoek, *De Dominio Maris*, cap. ii.; Polson, *Law of Nations*, § 5; Vattel, *Droit des Gens*, liv. i. ch. xxiii. § 289; Valin, *Com. sur l'Ord.*, liv. v. tit. i.; Azuni, *Droit Maritime*, tom. i. ch. ii. art. iii.; Garden, *De la Dip.*, tom. i. p. 399; Hautefeuille, *Droit des Nations Neut.*, tit. i. ch. iii. § 1; Ortolan, *Diplomatie de la Mer*, liv. ii. ch. viii.; De Cussy, *Droit Maritime*, liv. i. tit. ii. § 40; Pistoye et Duverdy, *Traité des Prises*, tit. ii. ch. i. § 1; Heffter, *Droit International*, §§ 65 et seq.; Riquelme, *Derecho Púb. Int.*, lib. i. tit. ii. cap. iii.; Loccenius, *De Jure Maritimo*, lib. i. cap. iv. § 6.

² 'The Franconia,' *R. v. Keyn*, 2 *L.R. Exch. Div.*, p. 63; Bluntschli, *Int. Law*, § 322.

the consent of the Secretary of State or Governor of the colony. This statute was passed in consequence of the decision of a small majority of judges in the 'Franconia' case in the Court of Crown Cases Reserved, that there was no jurisdiction in England to try a foreigner who had committed manslaughter at sea within three miles of the British coast. The prisoner had been indicted at the Central Criminal Court for manslaughter. He was a foreigner, and in command of a foreign ship, passing within three miles of the shore of England, on a voyage to a foreign port ; and whilst within that distance, his ship ran into an English ship and sank her, whereby a passenger on board the latter ship was drowned. The facts of the case were such as to amount to manslaughter by English law. It was held by the majority of the Court (Cockburn, C.J., Kelly, C.B., Bramwell, J.A., Lush and Field, J.J., Sir R. Phillimore and Pollock, B.), on the ground that prior to 28 Hen. VIII., c. 15, the admiral had no jurisdiction to try offences by foreigners on board foreign ships, whether within or without the limit of three miles from the shore of England, and because the subsequent statutes only transferred to the common law courts the jurisdiction formerly possessed by the admiral, that therefore, in the absence of statutory enactment, the Central Criminal Court had no power to try the above offence. On the other hand, Lord Coleridge, C.J., Brett and Amphlett, J.J.A., Grove, Denman, and Lindley, J.J., held that the sea within three miles of the coast of England is part of the territory of England ; that the English criminal law extends over those limits ; and that the admiral formerly had and the Central Criminal Court now has, jurisdiction to try offences there committed, although on board foreign ships. Lord Chief Justice Cockburn, in the course of a very exhaustive summing-up, representing the opinion of the majority of the Court, thus epitomised the contention for the prosecution :—

‘ Although the occurrence on which the charge is founded took place on the high seas in this sense, that the place in which it happened was not within the body of a county, it occurred within three miles of the English coast ; by the law of nations the sea, for a space of three miles from the coast, is part of the territory of the country to which the coast belongs ; and consequently the “ Franconia,” at the time the

offence was committed, was in English waters, and those on board were therefore subject to English law.' He then observes :—' From the earliest period of English legal history, the cognisance of offences committed on the high seas had been left to the jurisdiction of the admiral. Every offence was triable only in the county in which it had been committed. If an offence was committed in a bay or gulf, *inter fauces terræ*, the common law could deal with it, because the parts of the sea so circumstanced were held to be within the body of the adjacent county or counties ; but along the coast, on the external sea, the jurisdiction of the common law extended no further than to low-water mark. The office of coroner could not be executed by the coroner of a county in respect of matters arising on the sea. An inquest could not be held by one of these officers on a body found on the sea. Such jurisdiction could only be exercised by a coroner appointed by the admiral. A similar difficulty existed as to wrongs done on the sea, and in respect of which the party wronged was entitled to redress by civil action till the anomalous device of a fictitious venue within the jurisdiction of the common law courts, and which those courts did not allow to be disputed, was resorted to, and so the power of trying such actions was assumed. . . . 15 Ric. II., c. 3, gave the admiral concurrent jurisdiction with the common law, in respect of "the death of a man and of a mayhem done in great ships being and hovering in the main stream of the great rivers, only beneath the points of the same rivers, and in no other place of the same rivers." . . . On the shore of the outer sea, the body of the county extends so far as the land is uncovered by water, and between high and low water mark the jurisdiction has been divided between the Admiralty and the common law, according to the state of the tide. . . . We must therefore deal with this case as one which would have been under the ancient jurisdiction of the admiral. But the jurisdiction of the admiral, though largely asserted in theory, was never, so far as I am aware—except in the case of piracy, which, as the pirate was considered the *communis hostis* of mankind, was triable anywhere—exercised or attempted to be exercised in respect of offences over other than English ships. No instance of any such exercise or attempted exercise, after every possible search has been made, has been brought to our

notice. Though, by 25 Hen. VIII., c. 15, the trial of offences previously within the jurisdiction of the admiral, was transferred to commissioners, I think that all that was effected by this statute or by those who have succeeded, as regards jurisdiction, was a transfer of the criminal jurisdiction of the admiral, such as it was, to courts proceeding according to the ordinary procedure of the common law. The 4 and 5 Wm. IV., c. 36, which gives power to the Central Criminal Court to try "offences committed on the high seas and other places within the jurisdiction of the Admiralty of England," has obviously carried the matter no farther. If the admiral had not jurisdiction as to offences committed on foreign ships, the commissioners must be equally without it.'

He then cites *Reg. v. Serva and others* (1 *Den. Cr. C.*, 104); and *Reg. v. Lewis* (1 *Dears. and B. Cr. C.*, 182) in support of the want of jurisdiction. The former case occurred off the coast of Africa, and decides that an English court of justice has no authority to try a foreigner, accused of having committed an offence on a foreign vessel, not within British waters. In the latter case, a foreign sailor was wounded on the high seas, but died at Liverpool of the injury. A conviction was sought under the provisions of 9 Geo. IV., c. 31, § 8, but it was held that the statute did not apply to foreigners for acts committed out of British territory. He also cites the American cases, *Palmer's case* (3 *Wheat.* 610); the *U.S. v. Howard* (3 *Wash. C.C. R.* 340); the *U.S. v. Klintock* (5 *Wheat.* 144); the *U.S. v. Kessler* (*Bald.* 15); the *U.S. v. Holmes* (*ibid.*). He then proceeds to observe that 'the jurisdiction of the admiral, however largely asserted in theory in ancient times, being abandoned as untenable, it was necessary for the Crown to have recourse to a doctrine of comparatively modern growth—namely, that a belt of sea to a distance of three miles from the coast, though so far a portion of the high seas as to be still within the jurisdiction of the admiral, is part of the territory of the realm, so as to make a foreigner in a foreign ship within such belt, though on a voyage to a foreign port, subject to our law, which it is clear he would not be on the high sea beyond such limit.' He adds, that 'the three-mile belt is a doctrine unknown to the ancient law of England,' although he admits that, as shown by the 4 *Inst.*, Selden's *Mare Clausum*, b. 2, Lord Hale,

De Jure Maris, and by Sir Leoline Jenkins, the kings of England at an early period claimed sovereignty over the narrow seas. He next examines the various writers who, while maintaining the freedom of the seas, have expressed an opinion that an exclusive right might be acquired in respect of certain parts of the sea adjoining individual States, such as Grotius, *De Jur. Bell. et Pac.*, lib. ii. c. ii. § 13; Albericus Gentilis; Baldus; Bodinus; Loccenius, *De Jur. Mar.*, ch. iv. § 6; Puffendorf, lib. iv. c. ii. § 8; Casaregis, *Discursus de Com.*; Bynkershoek, *De Dom. Mar.* The unanimity of opinion that the littoral sea is, at all events for some purposes, subject to the dominion of the local State might, in the opinion of the Lord Chief Justice, go far to show that by the concurrence of other nations such a State may deal with these waters as subject to its legislation, but he thinks that it fails to show that in the absence of such legislation the ordinary law of the local State would extend over the waters in question. Finally, he is of opinion that, although the littoral sea around England is subject to British jurisdiction for some purposes, yet that the criminal law of England does not prevail over it ('The Franconia,' Reg. v. Keyn, 2 L. R. (Exch. Div.) 63.) See also the debate in the House of Lords on this subject at the end of this chapter.

§ 14. The term 'coasts' does not properly comprehend all the *shoals* which form sunken continuations of the land perpetually covered with water, but it includes all the natural appendages of the territory which rise out of the water, although they may not be of sufficient firmness for habitation or use. No matter whether such appendages are composed of mud or of solid rock, they are considered as a part of the territory of the main land, the right of dominion not depending upon the texture of the soil. This question was directly decided in a case which had reference to a little mud island at the mouth of the Mississippi river, composed of earth and trees drifted down by the river, and not of sufficient consistency to support the purposes of life.¹

§ 15. Another case, involving the international right of domain and property, is that of islands in the sea, which do not derive their elements, on the principle of alluvion² and

¹ The 'Anna,' 5 Rob. R., 385; Wildman, *Int. Law*, vol. i. pp. 39, 70.

² 'Alluvion' is the addition made to land by the washing of the sea

increment, immediately from the main shore, but are separated from it by deep channels of a greater or less width. Such islands, if in the vicinity of the main land, are regarded as its dependencies, unless some one else has acquired title to them by virtue of discovery, colonisation, purchase, conquest, or some other recognised mode of territorial acquisition.¹ The ownership and occupation of the main land includes the adjacent islands, even though no positive acts of ownership may have been exercised over them. In such a case, the attempt of another Power, without title, to colonise them, would be a just cause of complaint, and, if persisted in, of war. But if such islands be in the sea, distant from the main land, their ownership follows the general rule of discovery, occupancy, colonisation, purchase and conquest.²

By the Act of Congress, approved August 18, 1856, when any citizen of the United States discovers a deposit of guano on any island, rock or key, not within the lawful jurisdiction of any other Government, and not occupied by the citizens of any other Government, and shall take peaceable possession thereof, and occupy the same, such island, rock or key may, at the discretion of the President of the United States, be considered as appertaining to the United States, and the land and naval forces may be employed by the President to protect the rights of such discoverers, or their assigns.

or river. The characteristic of alluvion is its imperceptible increase, so that it cannot be perceived how much is added in each moment of time.

¹ Britton, *De Purchas.*, lib. ii. ch. ii. § 8 ; Bracton, ch. xii. lib. ii. ; Justinian, *Instit.*, lib. ii. tit. ii. § 22 ; Callis, *On Sewers*, 46 ; Hale, *De Jure Maris*, passim.

² By the General Act of the Berlin Conference, 1885, it is declared (Art. 34) by Austria, Belgium, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Portugal, Russia, Spain, Sweden and Norway, Turkey, and the United States that 'Any Power which henceforth takes possession of a tract of land on the coasts of the African continent, outside of its present possessions, or which, being hitherto without such possessions, shall acquire them, as well as the Power which assumes a protectorate, shall accompany the respective act with a notification thereof addressed to the other signatory Powers of the present Act, in order to enable them, if need be, to make good any claims of their own,' and (Art. 35) 'the Signatory Powers of the present Act recognise the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African continent sufficient to protect existing rights and, as the case may be, freedom of trade and transit under the conditions agreed upon.' It should be observed that this agreement only affects the coasts, not the islands, of Africa.

Nevertheless, such islands, rocks or keys are not made a part of the union of the United States; and all acts done, and offences or crimes committed thereon, or in the waters adjacent thereto, are to be held and deemed to have been done or committed on the high seas, on board a ship or vessel belonging to the United States, and be punished according to the laws of the United States relating to such ships or vessels, and offences committed on the high seas.¹

§ 16. The exclusive right of domain and territorial jurisdiction of the British Crown have immemorially extended to the bays or portions of the sea cut off by lines drawn from one promontory to another, along the coasts of the island of Great Britain. They are commonly called the *king's chambers*.² A similar jurisdiction, or right of domain, is also asserted by the United States over the Delaware Bay, and other bays and estuaries, as forming portions of their territory. Other nations have claimed a right of territory over bays, gulfs, straits, mouths of rivers, and estuaries which are enclosed by capes and headlands along their respective coasts, and the principle would seem to be pretty well established as a rule of international law.³

§ 17. The principle of this rule is not now contested, but differences have arisen with respect to its limitation, and its application to particular cases, or, in other words, as to what constitutes a bay or estuary, or mouth of a river, and what must be regarded as a portion of the open sea, which is the property or territory of no one, but is common to all nations. As a general rule, the right of fishing in the waters adjacent to the coast belongs exclusively to the inhabitants of the country whose coast it is. In 1818 a Convention was entered into between Great Britain and the United States by which it was settled that the inhabitants of British dominions in America and inhabitants of the United States should have liberty to

¹ Brightley, *Digest of the Laws of the U. S.*, p. 301; Ortolan, *Domaine International*, § 93.

² The Convention of 1867 between Great Britain and France (which is a schedule to the 31 and 32 Vict., c. 45) defines, for the purpose of sea-fisheries, the *King's chambers* to be bays 'the mouths of which do not exceed ten miles in width.'

³ Sir L. Jenkins, *Life and Works*, vol. ii. pp. 727-8, 780; 'Le Louis,' 2 *Dodson R.*, 245; case of the 'Washington,' *Com. between the U. S. and G. B.*, pp. 170-186.

fish and to dry and cure fish within certain portions of Newfoundland, the Magdalen Islands, Labrador, and the Straits of Belleisle, without prejudice, however, to the right of the Hudson Bay Company ; the American fishermen to exercise this right under certain restrictions. By this Convention the United States 'renounced for ever any liberty heretofore enjoyed, or claimed by her inhabitants, to take, dry, or cure fish on, or within three marine miles of any of the coasts, bays, creeks, or harbours of his Britannic Majesty's dominions in America,' except as therein before excepted. From 1849 to 1852 serious difficulties occurred between the inhabitants of the two countries with respect to the construction of this treaty : the one contending that the *three miles* were to be measured from a line uniting the extreme headlands of the coasts of Nova Scotia, while the other party objected to this, on the ground that the line so drawn cut off large portions of the open sea, or broad estuaries, which were the common property of all ; and that such line must be drawn from one headland to the next adjacent, so as not to include these broad bays, or slight indentations, which were properly portions of the open sea. Serious collisions were at one time apprehended between the men-of-war sent by the two Governments to protect their respective fisheries. A mutual forbearance, however, prevented a resort to force, and in 1854 another treaty was made between the same Governments, but it came to an end in 1866, at the desire of the United States. By the treaty of Washington, 1871 (Art. 18), the inhabitants of the United States obtained certain additional liberty as to taking and curing fish in certain sea-fisheries of the British North American Colonies, in common with British subjects ; Art. 19 gave British subjects corresponding rights in certain United States sea-fisheries. These fishery clauses lapsed in 1885 at the desire of the United States ; a commission was appointed in 1887 to endeavour to effect an amicable settlement on the fishery question.¹

By an agreement between Great Britain and the United States, dated June 15, 1891, the killing of seals in that part of

¹ 32nd Congress, 1st Sess. Senate Ex. Doc., No. 100 ; Spe. Sess., 1853, Sen. Ex. Doc., No. 3 ; President's Message, Cong. Doc., 1855-6 ; *Annales Marit. et Colo.*, 1839, pt. i. p. 861 ; De Cussy, *Droit Maritime*, liv. i. tit. ii. § 41 ; Elliot's *Diplomatic Code*, vol. i. p. 281.

Behring Sea lying eastward of the line of demarcation described in Art. 1 of the treaty of 1865 between the United States and Russia, was prohibited until May, 1892 ; but an allowance of 7,500 seals was excepted from this agreement, to be taken on the islands of the Behring Sea for the subsistence of the natives.

§ 18. But, besides this claim of maritime territory over the mouths of rivers, bays and estuaries along the coast, different nations have at different times, as hereinbefore mentioned, asserted a right of property to certain narrow seas and straits adjacent to their shores, and outside of any lines joining one cape or promontory with another. Such claims have generally been placed on the ground of immemorial use, or prescription. The honours and duties demanded by the State asserting such maritime supremacy have been paid or refused by other nations, according to circumstances.¹

Claims to
portions of
the sea

§ 19. The claim of Denmark to impose what are called *Sound dues*, was rested by the Danish publicists and diplomatists, not only upon immemorial prescription, sanctioned by a long succession of treaties with other Powers, but upon a kind of vested right, originating in remote antiquity, recognised by the system of public law subsequently subsisting, and ratified by the acquiescence of all maritime nations from time immemorial ; and they said the claim was originally founded in equity, and still has equitable considerations in its favour, in virtue of the expenses incurred by Denmark in improving the navigation of the Sound for the general benefit of commerce. They admitted 'that the general principles of the law of nations would now hardly seem to sanction the imposition of tolls similar to the Sound dues, where none before had existed.' The United States denied the *right* of Denmark to collect such dues, and 'adopted the conclusion that they are under no obligation, arising from international law or treaty stipulation, to yield to this claim,' while they admitted the 'necessity to keep up, at considerable expense, lighthouses, buoys, &c., for the security of this navigation,' and that the expenditure made by Denmark for this purpose,

Danish
Sound
dues

¹ See *ante*, ch. v. § 18 ; Selden, *Mare Clausum*, passim ; Stymann, *De Jure Maritimo*, lib. i. cap. iv. p. 179 et seq. ; Gunther, *Europ. Völkerrecht*, t. ii. p. 46 ; Rayneval, *Inst. du Droit Nat.*, liv. ii. ch. x. ; Bowyer, *Universal Public Law*, ch. xxviii. ; Heffter, *Droit International*, § 75 ; Hautefeuille, *Des Nations Neutres*, pt. i. ch. iii. § 2.

'may constitute an equitable claim upon foreign Powers for remuneration to the extent they have participated in this advantage,' and that 'they would not hesitate to share liberally in compensating Denmark for any fair claim for expenses she may incur in improving and rendering safe the navigation of the Sound.' 'In claiming an exemption of our ships and their cargoes from taxation, by Denmark, at the straits of the Baltic,' continues Mr. Marcy, the American Secretary of State, 'the United States are vindicating a great national principle of extensive and various application. If yielded in one instance, it will be difficult to maintain it in others. If exactions upon our trade at the entrance of the Baltic were acquiesced in by the United States, similar exactions might, on the same principle, be demanded at the Straits of Gibraltar and Messina, at the Dardanelles, and on all great navigable rivers whose upper branches and tributaries are occupied by different independent Powers.' The dispute was amicably arranged by the convention of February 12, 1858, the Sound and Belts being made entirely free to American vessels and their cargoes, the United States paying a fixed sum *en bloc* for lighthouses, buoys, &c.¹ Similar treaties had been entered into in 1857 by Denmark with Belgium, France, Great Britain (who compounded for 1,125,206*l.*), Hanover, Mecklenburg-Schwerin, the Netherlands, Austria, Oldenburg, Prussia, Russia, Sardinia, Sweden, and the Hanseatic towns; these were followed by treaties with Portugal and the Two Sicilies in 1858, with Turkey in 1859, and with Spain in 1860.

**Mare
clausum
and mare
liberum**

§ 20. No one would now think of reviving the controversy which once occupied the pens of the ablest European jurists, with respect to the right of any one State to appropriate to its own use, and to the exclusion of others, any part of open sea or main ocean, beyond the immediate vicinity of its own coast; but it has sometimes been attempted to extend the principle of *mare clausum* to inland seas, not entirely enclosed within the territorial limits of a single State. Thus, in the treaties of armed neutrality of 1780 and 1800, and in the

¹ *President's Messages*, Dec. 1854 and 1855; Marcy, *Cor. Dep. of State, on Danish Sound Dues*; Wildman, *Int. Law*, vol. i. ch. ii.; Webster's *Life and Works*, vol. vi. p. 466; Cong. Doc. *H. of R.*, 33rd Cong. 1st Sess. *Ex. Doc.*, 108.

treaty of 1794 between Denmark and Sweden, the tranquillity of the Baltic Sea was proclaimed and guaranteed ; and in the Russian declaration of war against Great Britain of 1807, the inviolability of that sea, and the reciprocal guarantees of the Powers bordering upon it, were stated as aggravations of the British proceedings, in entering the Sound and attacking the Danish capital in that year. In consequence of the secret Articles of Tilsit, Great Britain demanded the surrender of the Danish fleet, with the promise of its restoration when peace should return. This proposal being rejected, Copenhagen was bombarded by the British fleet until Denmark accepted the proposal—a stern measure, required by the exigency of the occasion. The attempt, on the part of the Baltic Powers, to establish in themselves the exclusive control of the Baltic Sea, contrary to the well-established principles of international law, greatly weakened the force of their complaints against the proceedings of Great Britain toward Denmark. The law of nations does not permit any number of nations, bordering upon a sea, to combine together to close it against the commerce of the rest of the world.¹

§ 21. It is generally admitted that the territory of a State includes the seas, lakes, and rivers entirely inclosed within its limits. Thus, so long as the shores of the Black Sea were exclusively possessed by Turkey, that sea might, with propriety, be considered as a *mare clausum* ; and there seemed no reason to question the right of the Ottoman Porte to exclude other nations from navigating the passage which connects it with the Mediterranean, both shores of this passage being also portions of the Turkish territory. But when Turkey lost a part of her possessions bordering upon this sea, and Russia had formed her commercial establishments on the shores of the Euxine, both that empire and other maritime Powers became entitled to participate in the commerce of the Black Sea, and consequently to the free navigation of the Dardanelles and the Bosphorus. This right was expressly recognised by the treaty of Adrianople in 1820. The right of free navigation of the Black Sea, and the consequent right

¹ Bynkershoek, *De Dominio Maris*, cap. vii. ; Vattel, *Droit des Gens*, liv. i. ch. xxiii. §§ 279, 286 ; Ortolan, *Dip. de la Mer*, tom. i. pp. 120–126 ; Polson, *Law of Nations*, sect. v. Bello, *Derecho Internacional*, pt. i. cap. ii. § 4 ; Hautefeuille, *Des Nations Neutres*, tit. i. chs. iii. iv.

of passage through the Dardanelles and the Bosphorus, does not, however, interfere with the right of *territorial jurisdiction* which the Ottoman Porte exercises over these straits. These straits are bounded on both sides by the territory of the Sultan, and are, in most parts, less than six miles wide ; consequently he has a right to exclude all foreign ships of war from entering or passing either the Dardanelles or the Bosphorus. This right has been recognised in the Treaties of London, 1841, and of Paris, 1856, but was considerably modified by the Treaty of London, 1871.¹

The great
lakes and
their
outlets

§ 22. The great inland lakes, and their navigable outlets, are considered as subject to the same rule as inland seas : where enclosed within the limits of a single State they are regarded as belonging to the territory of that State ; but if different nations occupy their borders, the rule of *mare clausum* cannot be applied to the navigation and use of their waters. No distinction is made between salt-water lakes, or inland seas and fresh-water lakes. The right of territorial jurisdiction over the outlets of these inland waters, when narrow, and of excluding foreign ships of war, will be particularly discussed in another chapter.

¹ By the Treaty of London of 1841 the Sultan declared that, according to the ancient rule of his empire, and so long as the Porte should be at peace, he would admit no foreign vessel of war into the Dardanelles ; and the five Great Powers engaged to respect this determination, which did not include the passage of light-armed vessels in the service of the ministers of friendly Powers. This right of the Porte was recognised by the Treaty of Paris in 1856 ; but the Powers were permitted to send light ships of war into the Danube for carrying out the regulations of police of the river. This treaty also provided for the neutralisation of the Black Sea. In 1871, at the desire of Russia, the Conference of London abrogated the neutralisation of the Black Sea, and declared that power be given to the Porte to open the straits in time of peace to the vessels of war of friendly and allied Powers in case it should judge it necessary, in order to secure the execution of the stipulations of the Treaty of Paris, 1856 ; the Commission established by Art. xvi. of the Treaty of Paris for the execution of the works necessary to clear the mouths of the Danube and neighbouring parts of the Black Sea from sand and other impediments was prolonged for twelve years, and all the works of the Commission were to continue to enjoy the same neutrality hitherto afforded to them. This provision was in no way to affect the right of the Porte to send, as theretofore, its vessels of war into the Danube, in its character of territorial Power. The Black Sea was expressly declared to remain open as theretofore to the mercantile marine of all nations. In the 18th Protocol to the Treaty of Berlin, 1878, it is to be noticed that Great Britain declares that her obligations relating to the closing of the Dardanelles do not go further than an engagement with the Sultan to respect, in this matter, his independent determination in conformity with the spirit of existing treaties.

§ 23. A river which flows, for its entire length, through the territory of a State, is regarded as forming part of its dominion, including the bays and estuaries formed by its junction with the sea. Where the entire upper portion of a navigable river is included within a single State, the part so enclosed is undoubtedly the property of such State. Where navigable river forms the boundary of conterminous States, the middle of the channel—the *filum aquæ*, or *Thalweg*—is generally taken as the line of their separation, the presumption of law being, that the right of navigation is common to them both. But this presumption may be rebutted or destroyed by actual proof of the exclusive title of one of the riparian proprietors to the entire river. Such title may have been acquired by prior occupancy, purchase, cession, treaty, or any one of the modes by which other public territory may be acquired. But where the river not only separates the conterminous States, but also their territorial jurisdictions, the *Thalweg*, or middle channel, forms the line of separation through the bays and estuaries through which the waters of the river flow into the sea. As a general rule, this line runs through the middle of the deepest channel, although it may divide the river and its estuaries into two very unequal parts. But the deeper channel may be less suited, or totally unfit, for the purposes of navigation, in which case the dividing line would be in the middle of the one which is best suited and ordinarily used for that object. The division of the islands in the river and its bays would follow the same rule.¹

Navigable
rivers as
bound-
aries

§ 24. Where the dividing line of two States is water, as a river or lake, which is subject to changes, important questions may arise respecting the rights of property. Thus, where by a gradual and insensible movement, the water advances on one side and recedes on the other, or by detrition on one side and deposit on the other, a portion of the soil is gradually transferred, there is evidently a loss to one State and an increase to the other. So, also, where islands are washed away on one side of the channel, and new ones formed on the other, there is a corresponding change of ter-

Changes
in divid-
ing rivers
and lakes

¹ Gundling, *Jus. Nat.*, p. 248 ; Wolfius, *Jus. Gentium*, §§ 106-109 ; Stypmannus, *Jus. Marit.*, &c., cap. v. n. 476-552 ; Merlin, *Répertoire*, voc. 'alluvium ;' Rayneval, *Droit de la Nature*, tom. i. p. 307 ; De Cussy, *Droit Maritime*, liv. i. tit. ii. § 57.

ritory. Again, suppose that the river or lake which constitutes the boundary has suddenly changed its bed ; will this change produce a corresponding increase or diminution of territory to the adjacent proprietors ? The Roman law determined with great care the effects of changes in the distribution of waters upon the ownership of private lands ; and the influence of this law is manifest in the rules adopted by publicists with respect to international property.¹

Effects on
bound-
aries

§ 25. Where the moving of the dividing water is so gradual as to be almost insensible, the changes produced are not considered as acquisitions and losses of property, but the natural consequences of property already existing ; because the thing owned is naturally susceptible of this physical increase or decrease. In such a case, whether the dividing water belongs entirely to one State, or the boundary is the middle or *Thalweg*, each party gains or loses accordingly as the increase or decrease is upon its side. The same rule applies to the gradual removal or formation of islands in a river or lake which divides States, or in the sea, within the territorial limits or *ligne de respect* of a State bordering upon the ocean. Moreover, a State has a certain right of preemption to islands formed adjacent to its coast, even outside of this line of respect. But the case is very different where the river abandons its ancient bed and forms a new channel, or where a lake leaves its former banks and forms a new lake, or a series of new lakes ; the boundaries of the States remain in the abandoned bed of the river, or in the position formerly occupied by the lake.²

¹ Rayneval, *Inst. du Droit Nat.*, liv. ii. ch. xi. ; Pothier, *Œuvres de*, tom. x. pp. 87, 88 ; Voet, *Ad Pandects*, tom. i. pp. 606, 607 ; Heineccius, *Recitaciones*, lib. ii. tit. i. §§ 356-369 ; *Las Siete Partidas*, pt. iii. tit. xxviii. l. xxxi. ; Alvarez, *Institutes*, lib. ii. tit. i. § 6 ; Asso, *Instituciones*, p. 101 ; Gomez, *Elementos*, lib. ii. tit. iv. § 3 ; *Febrera Mexicana*, tom. i. p. 161 ; *Sala Mexicana*, tomo ii. p. 62 ; Justinian, *Inst.*, lib. ii. tit. i. §§ 20-24 ; De Camps, *Manuel des Prop. Riv.*, passim ; Chardon, *Droit d'Alluvion*, passim.

² Grotius, *De Jure Bel. ac Pac.*, lib. vii. cap. iii. § 17 ; Ortolan, *Domaine International*, §§ 85-93 ; Heffter, *Droit International*, § 69, note ; Gunther, *Europ. Völkerrecht*, t. ii. p. 57 ; Pestel, *Commentarii de Repub. Batav.*, § 268 ; Bowyer, *Universal Public Law*, ch. xxviii. ; Riquelme, *Derecho Pub. Int.*, lib. i. tit. i. cap. iv. ; Bello, *Derecho Internacional*, pt. i. cap. iii. ; Pando, *Derecho Internacional*, p. 99 ; Almeda, *Derecho Público*, tom. i. p. 199 ; Cushing, *Opinions U. S. Attys.-Genl.*, vol. viii. p. 175 ; Crittenden, *Opinions U. S. Attys.-Genl.*, vol. v. pp. 264, 412 ; Puffendorf, *De Jure Nat. et Gent.*, lib. iv. cap. v. § 8 ; Wolfius, *Jus Gentium*, §§ 108, 109 ; Proudhon et Dumay, *Domaine Public*, tom. iv. ch. lvi. sect. 7.

§ 26. Where a navigable river, during a part of its course, flows through the territory or forms the boundary of one State, but passes through a third State before it enters the sea, questions of some difficulty have arisen with respect to its dominion and use. It is, however, now generally conceded that the right of navigation, for commercial purposes, is common to all the nations inhabiting the different parts of its banks. But this right of *innocent passage*, being what the text-writers call an *imperfect* right, its exercise is necessarily modified by the safety and convenience of the State which is affected by it, and can only be effectually secured by mutual conventions, regulating the mode of its exercise. In other words, the outlet of the river being entirely within the territorial jurisdiction of one State, that State may establish and enforce all proper and necessary regulations, so that this right of innocent passage shall neither endanger its own safety nor interfere with its own paramount right of legislation and jurisdiction. The Roman law declared navigable rivers to be so far public property that a free passage over them was open

Rivers
passing
through
several
States

A difference of opinion having for many years existed between Great Britain and the United States as to the meaning of the words 'the middle of the channel,' in the Treaty of Washington of June 15, 1846, it was agreed by the Treaty of Washington of May 8, 1871, to refer the difference to the arbitration of the Emperor of Germany.

The Treaty of Ghent had made the parallel of 49° N. the boundary line between the two countries as far as the Pacific. Opposite the sea-termination of this line lay Vancouver Island, recognised as a British possession. At the date of the first treaty of Washington, the portion of North-Western America adjacent to the line was altogether uninhabited by settled colonists, but as far as British dominion extended it was held under a terminable lease by the Hudson's Bay Company, and used only by hunters and fishermen under its control in common with numerous tribes of Indians. The treaty provided that the line of boundary on the 49° parallel should be continued 'westward along the said parallel of north latitude to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly through the middle of the said channel and of Fuca Straits to the Pacific Ocean.' In the middle of this channel lay the Island of San Juan, together with several smaller islets. Both countries contended for this island. The question referred to the Emperor was whether this channel should be run, as claimed by the Government of her Britannic Majesty, through the Rosario Straits, or through the Canal of Haro, as claimed by the Government of the United States.

The Emperor gave his award in favour of the United States, Oct. 21, 1872. But there is reason to believe that, had the fact of an existing third and middle channel dividing the group of islands been made part of the question, the Emperor would have selected the middle channel. As the matter was placed before him, he had no option save to select the Rosario or the Haro channel.

to everybody, but distinguished between rivers and the sea, the former being classed among *res publicæ*, and the latter among *res communes*.¹

Use of
their
banks

§ 27. The Roman law also declares the right to use the shores to be an incident to that of the water, and the right to navigate a river carries with it the right to moor vessels to its banks, to lade and unlade cargoes, &c. Publicists have applied this principle of the Roman civil law to the same case between nations, and infer the right to use the adjacent land for the purposes, as means necessary to the attainment of the end for which the free navigation of the water is permitted. The principal right would seem to draw after it the incidental right of using all the means which are necessary to secure its proper enjoyment. But this incidental right, like the principal right itself, is *imperfect* in its nature, and the mutual convenience of both parties must be consulted in its exercise.²

Right
of inno-
cent
passage

§ 28. Such right of innocent passage, though an *imperfect* right, and requiring mutual conventions regulating the mode of its exercise, is nevertheless a real, subsisting right, founded upon the law of nature, and recognised by the most approved writers on public law. It may also be added that it has been recognised by the general consent of nations, and must now be regarded as an established principle of international law.³

Modified
by com-
pact

§ 29. But those interested in the enjoyment of this principal right, and its incidents, may renounce them entirely, or consent to modify them in such a manner as mutual convenience and policy may dictate. Thus, by the treaty of Westphalia, the navigation of the river Scheldt was closed to the Belgic provinces, in favour of the Dutch ; and by the treaties of Vienna, and subsequent conventions, the riparian Powers on the banks of the great rivers of Europe, agreed to certain detailed regulations respecting their navigation through the territory of the States in which such rivers debouched into

¹ Justinian, *Institutes*, lib. ii. tit. i. §§ 1, 2 ; Phillimore, *On Int. Law*, vol. i. §§ 155-6 ; Vattel, *Droit des Gens*, liv. ii. ch. ix. §§ 126-130 ; ch. x. §§ 132-134 ; Puffendorf, *De Jure Nat. et Gent.*, lib. iii. cap. iii. §§ 3-6 ; Polson, *Law of Nations*, § v.

² Wheaton, *Elem. Int. Law*, pt. ii. ch. iv. §§ 1, 3.

³ Grotius, *De Jure Bel. ac Pac.*, lib. ii. cap. iii. §§ 7-12 ; Heffter, *Droit International*, §§ 77-80.

the ocean. But this agreement of the riparian States to regulations of police and fixed toll duties on vessels and merchandise passing through the territory of another State, to and from the sea, or even an entire surrender or renouncement of the right, cannot be adduced as an argument against the existence of the right itself. On the contrary, if no such right existed, there would be no necessity for its regulation, and its renouncement would be an act of supererogation.¹

§ 30. The navigation of the Rhine has often afforded matters of difficulty and dispute between the States which border on it, or through whose territories it flows. By *Annexe* 16 to the final act of the Congress of Vienna, in 1815, the free navigation of this river was confirmed 'in its whole course, from the point where it becomes navigable to the sea, ascending and descending.' The interpretation of these stipulations gave rise to a controversy between the Kingdom of the Netherlands and other States interested in the navigation of that river, from the fact that the *Rhine*, properly so called, does not empty into the sea, but loses its waters among the sandy downs at Kulwick, the navigation being carried on through the mouths or arms of the sea called the *Leck*, the *Yssel*, and the *Waal* and *Meuse*. After a long and tedious negotiation, the question was finally settled by the convention of Mayence in 1841, providing for the free navigation and commerce of the riparian States 'into the sea,' with minute regulations of police, and fixed toll duties on vessels and merchandise passing to and from the sea, and to the ports of the upper riparian States on the Rhine.²

§ 31. The same principle was extended by the above Congress to the navigation of the *Neckar*, the *Mayn*, the *Moselle*, the *Meuse*, and the *Scheldt*; and similar provisions were made for the free navigation of the *Elbe* in 1821, and, at other periods, of the *Po*, the *Danube*,³ the *Vistula* and other rivers of ancient Poland. The treaty of Westphalia, 1648, by which the independence of the United Provinces

¹ Wheaton, *Hist. Law of Nations*, pp. 282-4, 552.

² Martens, *Nouveau Recueil*, tom. ix. p. 252; Ortolan, *Domaine International*, § 44.

³ See *supra*, and Treaty of London, 1871, arts. iv. to ix. The treaty of 1856 between Russia and Turkey was abrogated by treaty of March 13, 1871.

was acknowledged by Spain, contained a stipulation by which the river Scheldt was to continue shut on the side of the former, who were proprietors of both banks, toward the sea. It was also stipulated that the inhabitants of the United Provinces should abstain from frequenting the places occupied by Spain in the East Indies. Another motive alleged by the Dutch for this stipulation, closing the navigation of the lower Scheldt, was, that the whole course of the two branches of this river, which passed within the dominions of Holland, was entirely *artificial*; that it owed its existence to the skill and labour of Dutchmen; that its banks had been erected and maintained by them at great expense. The Emperor Joseph II., in 1781, attempted to open the navigation of this river, and for this purpose, in 1784, brought forward several antiquated claims against the Republic. A compromise was effected by the treaty of Fontainebleau, in 1785, by which it was agreed that the river Scheldt, from Saftingen to the sea, should continue to be shut on the side of the States-General, as well as the canals of Sas, Swin, and the other mouths of the sea there terminating, conformably to the treaty of Munster. In return for these concessions, the Dutch accorded several of the Emperor's demands, and agreed to pay an indemnity of ten millions of florins. The claim of Holland in this discussion was defended by Mirabeau, on the ground of positive conventional law. He was not absolutely opposed to the free navigation of the Scheldt, but, on the contrary, endeavoured to show how it might be opened without danger to Holland and Europe, by the independence of Belgium, which would form a neutral barrier to the United Provinces. The free navigation of this river was again seriously discussed in 1792-3, in the diplomatic correspondence between Holland, Belgium, England, and France; and the question finally settled, as before stated, by the Congress of Vienna, in 1815, on the basis of the celebrated memoir presented by Baron Wilhelm von Humboldt.¹

The Mississippi

§ 32. By the treaty of 1763, between France, Spain, and Great Britain, the boundary between the French and British possessions in North America was the middle of the river

¹ Martens, *Rec. de Traités*, tom. xxx. p. 209; Mayer, *Corpus Juris Germ.*, tom. ii. pp. 224-239, 298; De Cussy, *Droit Maritime*, liv. i. tit. ii. § 57; lib. ii. ch. xxviii.

Mississippi, from its source to the Iberville, and thence through that river, and lakes Maurepas and Pontchartrain, to the sea. The right of freely navigating the Mississippi from its source to the sea was, at the same time, secured to the subjects of Great Britain. Both Louisiana and Florida were afterwards ceded to Spain by France and Great Britain. By the independence of the United States its citizens had acquired the same rights, with respect to the navigation of the Mississippi, as had belonged to the subjects of Great Britain. But Spain having become possessed of both banks of that river, from its mouth to a considerable distance above, claimed its exclusive navigation below the southern boundary of the United States. This claim was contested by the United States, as contrary to the treaty of 1763, as well as in violation of the law of nature and of nations. The dispute was terminated by the treaty of San Lorenzo el Real, in 1795, by which the free navigation of the Mississippi was secured to the citizens of the United States, in its whole breadth, from its source to the ocean. By the subsequent acquisition of Louisiana and Florida by the United States, the whole river, from its source to the Gulf of Mexico, was included within their territory, and, consequently, to them belonged the exclusive right of its navigation.¹

§ 33. The relative position of the United States and Great Britain in respect to the navigation of the great northern lakes and the river St. Lawrence appears to be similar to that of the United States and Spain, previously to the cession of Louisiana and Florida, in respect to the Mississippi; the United States being in possession of the southern shores of the lakes and the river St. Lawrence to the point where their northern boundary strikes that river, and Great Britain of the northern shores of the lakes and of the river to the same point, and of both banks of the river from the latitude forty-five degrees north to the sea. The United States in 1826 claimed the right to navigate the St. Lawrence to and from the sea, as one to which they were entitled by the laws of nations. In addition to the arguments used in support of their right, in 1795, to the free navigation of the Mississippi, when Spain possessed both banks of that river near its mouth, the United

The St.
Lawrence

¹ Wheaton, *Hist. Law of Nations*, pp. 506 et seq. ; Waite, *State Papers*, vol. x. pp. 135-140.

States fortified their claim by the consideration that this navigation was, before the war of the American revolution, the common property of all the British subjects inhabiting this continent, having been acquired from France by the united exertions of the mother country and the colonies in the war of 1756 ; and that their claim to the free navigation of the St. Lawrence was precisely of the same nature with that of Great Britain to the navigation of the Mississippi, recognised in 1763, when the mouth and lower shores of that river were held by another Power.¹

The arguments of the British Government against this claim were that the liberty of passage to be enjoyed by one nation through the dominions of another was a qualified occasional exception to the paramount rights of property ; that such right was termed by the most eminent writers on public law an imperfect right ; that there was nothing in these writers or in the stipulations of the treaties of Vienna respecting the navigation of the great rivers of Germany to countenance the American doctrine of an absolute natural right ; that these stipulations were the result of mutual consent founded on considerations of mutual interest growing out of the relative situation of the different States concerned in this navigation ; that the same observation would apply to the various conventional regulations which had been at different periods applied to the navigation of the Mississippi ; that as to any supposed right derived from the simultaneous acquisition of the St. Lawrence by the British and American people, it could not be allowed to have survived the treaty of 1783, by which a partition of the British dominions in North America was made between the new Government and the mother country. The United States argued in reply that the St. Lawrence should be regarded as a *strait* connecting navigable seas. ' It seems difficult to deny,' says Sir Robert Phillimore, ' that Great Britain may have grounded her refusal upon strict law, but it is at least equally difficult to deny, first, that in so doing she put in force an extreme and hard law ; secondly, that her conduct with respect to the navigation of the St. Lawrence was inconsistent with her conduct with respect to the navigation

¹ Wheaton, *Hist. Law of Nations*, pp. 511 et seq. ; Phillimore, *On Int. Law*, vol. i. § 170 ; *Congress Docs.* 1827-1828, No. 43 ; Hansard, *Parl. Deb.*, vol. cxxvii. No. 6, pp. 1073-4

of the Mississippi. On the ground that she possessed a small tract of domain in which the Mississippi took its rise, she insisted on her right to navigate the entire volume of its waters, on the ground that she possessed both banks of the St. Lawrence where it disembogued itself into the sea ; she denied to the United States the right of navigation, though about one half of the waters of lakes Ontario, Erie, Huron, Superior, and the whole of lake Michigan, through which the river flows, were the property of the United States.' The question was for a time satisfactorily arranged by the commercial treaty of June 5, 1854, between the two countries. This treaty, however, was determined by the United States in 1865 ; and in 1871 it was agreed by the treaty of Washington that 'the navigation of the river St. Lawrence, ascending and descending, from the forty-fifth parallel of north latitude, where it ceases to form the boundary between the two countries, from, to, and into the sea, shall for ever remain free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of Great Britain or of the Dominion of Canada not inconsistent with such privilege of free navigation. The navigation of the rivers Yukon, Porcupine, and Stikine, ascending and descending, from, to, and into the sea shall for ever remain free and open for the purposes of commerce to the subjects of her Britannic Majesty, and to the citizens of the United States, subject to any laws and regulations of either country within its own territory not inconsistent with such privilege of free navigation. . The navigation of Lake Michigan shall also, for the term of years mentioned in Article XXXIII. of this treaty (*i.e.*, ten years, and until the expiration of two years after either of the parties shall have given notice to the other of its wish to terminate the same) be free and open for the purposes of commerce to the subjects of her Britannic Majesty, subject to any laws and regulations of the United States or of the States bordering thereon not inconsistent with such privilege of free navigation.'

APPENDIX

THE 'FRANCONIA' CASE

IN consequence of the judgment in the case of the 'Franconia' (*ante*, p. 160), the Lord Chancellor (Lord Cairns), in February, 1878, called the attention of the House of Lords to the question of the jurisdiction of the Crown in the territorial waters of the Empire, and presented a Bill on the subject, which afterwards passed as the Act of Parliament, 41 and 42 Vict., c. 73. He said: The jurisdiction to which he had to call attention was not over rivers, bays, or harbours, because in respect of that no controversy had ever arisen, but the jurisdiction over the territorial waters in that belt or zone of the high seas which more or less surrounded the shores of the Empire. This, at first sight, would appear to be a question of law. No doubt it was a question of law, but he rather thought of that which had been described as the first law of nature—the law of self-preservation. It was necessary, to some extent and in some measure, that there should be a territorial jurisdiction over the high seas surrounding the seaboard. No empire which had a seaboard could be allowed to remain without a jurisdiction of that kind. If in the case of such an empire it was held that the jurisdiction of the kingdom ended with the dry land, the consequence would be that the subjects of that kingdom in the presence of foreigners would be absolutely without defence from the moment they entered the sea for the purpose of bathing, or fishing, or for any other purpose. Not only so, but when on dry land they would be without a protection, because if no jurisdiction from the land extended to the sea surrounding the seaboard, people from all parts of the world might come to the part of the high sea contiguous to the land and resort to practices which might be of the most serious character to people on shore. So, again, in the case of war, hostilities carried on by belligerents outside the shore might expose a neutral Power to the greatest danger. It might be asked whether the question was not solved, so far, at all events, as to the low-water mark to which unquestionably the territorial jurisdiction extended. With regard to the low-water mark it must be remembered that there were parts of the coasts where there were considerable intervals between high- and low-water mark, and also there were in the kingdom, as their lordships knew, many places where the sea came so close to the cliffs that there was absolutely no horizontal interval between high- and low-water marks. It had been suggested, or might be suggested, that if the jurisdiction of this country extended over the part of the high seas immediately adjoining the shore, inasmuch as the right of passage over that part was allowed to foreign ships, it would be unfair to claim such a jurisdiction as against them. He was quite willing to concede the right of passage contended for, but he had imagined that it was to be conceded on this footing, and this footing only—that those who availed themselves of the right of passage should not expose themselves to any complaint of a violation of the rights of those by whom the right of passage was conceded. In truth, any such exemption would apply to the case of foreign ships coming into one of our bays. What made it necessary for him to bring this matter under the notice of their Lordships was a case of considerable interest—that of the collision between the 'Franconia' and the 'Strathclyde' off Dover, by which a number of persons lost their lives. [His Lordship here gave a short history of the facts.] He would endeavour to explain what he understood to be the main ground of the judgment of the majority

of the judges in the 'Franconia' case. But before he did so, there was an incident which he wished to mention to their Lordships. One of the learned judges, for whom they all had the greatest respect, and whose judgment, from his experience in criminal cases, was of the greatest weight—Mr. Justice Lush—stated that though he concurred with the Lord Chief Justice in that learned Judge's view of the case, yet he wished to guard himself in this particular case with respect to the limits of the high seas. He said:—

'I wish to guard myself from being supposed to adopt any words or expressions which may seem to imply a doubt as to the competency of Parliament to legislate as it may think fit for these waters. I think that usage and the common consent of nations, which constitute international law, have appropriated these waters to the adjacent State, to deal with them as the State may deem expedient for its own interests. They are, therefore, in the language of diplomacy and of international law, termed by a convenient metaphor the territorial waters of Great Britain, and the same or equivalent phrases are used in some of our statutes, denoting that this belt of sea is under the exclusive dominion of the State. But the dominion is the dominion of Parliament, not the dominion of the common law. . . . Therefore, although, as between nation and nation these waters are British territory, as being under the exclusive dominion of Great Britain, in judicial language they are out of the realm, and any exercise of criminal jurisdiction over a foreign ship in these waters must, in my judgment, be authorised by an Act of Parliament.'

As he understood these words, if Sir Robert Lush had found that in the particular place Parliament had stepped in and said that portion of the water was part of the United Kingdom, he would have been of opinion that the Crown had territorial jurisdiction over it, and the conviction ought not to be quashed. It was fortunate for the prisoner in the 'Franconia' case, though not fortunate for the vindication of the law, that Mr. Justice Lush was under the impression that that had not been done which really had been done. It appeared that in an Act of 1848 for the regulation of Customs there was a provision authorising the Lords of the Treasury to establish ports in many places where ports were required, and to define their limits. Under that provision the Lords of the Treasury issued a warrant, which was inserted in the *London Gazette* of March 3, 1848. In that warrant were these paragraphs:—

'That the limits of the port of Dover shall commence at St. Margaret's Bay aforesaid, and continue along the said coast of Kent to Copt Point in the said county. That the limits of the port of Folkestone shall commence at Copt Point aforesaid, and continue along the coast to Dungeness, in the said county.'

'And we, the said Commissioners of her Majesty's Treasury, do further declare that the limits seaward of the said ports shall extend to a distance of three miles from low-water mark out to sea, and that the limits of such ports shall include all islands, bays, harbours, rivers, and creeks within the same respectively.'

So that under Parliamentary powers the proper authorities had declared long before the 'Franconia' case that the limits of the port of Dover extended three miles out to sea. We understood the view of the majority of the judges to be this, that there was one jurisdiction by land and the other by sea; that the jurisdiction by land was one limited by the limits of counties, taking into the county the low-water mark and the harbours and rivers within the county; and the jurisdiction by sea, the old jurisdiction of the Lord High Admiral now exercised by the Central Criminal Court; that the jurisdiction of the Lord High Admiral extended to the

high seas, but the persons over whom it was exercised must be British subjects, not foreigners; and that the Central Criminal Court had no jurisdiction over the persons of foreigners beyond the low-water mark. That he understood to be the common ground on which the majority of the judges acted in quashing the conviction. And taking that as the *ratio decidendi* of the judges in a decision which he accepted, it would at first sight appear that there was nothing more for him to do than to ask the favourable consideration of their Lordships for a Bill to amend the law; but there fell some observations from Sir Robert Phillimore, the Lord Chief Baron, and the Lord Chief Justice, whose judgment was the most elaborate, and might be regarded as the leading judgment of the majority, and which contained a principle that seemed to challenge the right of Parliament to legislate on this subject. Expressions of the Lord Chief Justice would certainly seem to imply that we could not legislate with respect to the high seas even within the limits of the belt or zone to which he had referred without the consent of foreign nations, or until after communication with foreign nations. That was a very serious question. If the judgments of those learned judges amounted, as they were supposed to do, to a proposition of that kind, of course Parliament would be exceeding its powers if it entered into legislation applying to that belt or zone with the view of making foreigners amenable to our law. But he would ask their Lordships to consider whether there was any foundation for that principle. He ventured to think there was not, and he thought it would be a very serious thing if there were. He would lay before their Lordships the views of great constitutional writers of this Kingdom and of the United States on this question. Then he would add the views of international jurists on the Continent, and next he would show what our own judges had ruled in international cases, and lastly he would direct attention to what their Lordships themselves had done in the course of legislation. [His Lordship here referred to the principal English, American, and foreign writers on international law.] It appeared to be established as a matter of principle that there must be a zone. The only doubt was as to how far our limit extended. The authorities were clear on this—that if three miles were not found sufficient for the purpose of defence and protection, or if the nature of the trade or commerce in the zone required it, there was a power in the country on the seaboard to extend the zone; but at present there was a consensus of opinion among the authorities that certainly the jurisdiction extended to three miles. If that were not the established law, nations with a seaboard would be very much worse off than those which had none, because a neighbour on land you could make a treaty with or treat as an enemy, but if a nation with a seaboard had no control over a zone it would always be liable to dangerous aggression from beyond the sea. (Hear, hear.) He would now refer their Lordships to judicial opinion. In a case in which Prussia claimed restitution of a ship seized by an English man-of-war within three miles of Prussian territory, Lord Stowell said:—

‘A claim has been given for the Prussian Government, asserting the capture to have been made within the Prussian territory. It has been contended that although the act of capture itself might not have taken place within the neutral territory, yet that the ship to which the capturing boats belonged was actually lying within the neutral limits. The first fact to be determined is the character of the place where the capturing ship lay, whether she was actually stationed within those portions of land and water, or of something between water and land, which are considered to be within Prussian territory. She was lying within the eastern branch of the Ems, within what I think may be considered at a distance of three miles at most from East Friesland. I am of opinion that the ship was

lying within those limits in which all direct operations are by the law of nations forbidden to be exercised. No proximate acts of war are in any manner to be allowed to originate on neutral ground, and I cannot but think that such an act as this, that a ship should station herself on neutral territory and send out her boats on hostile enterprises, is an act of hostility much too immediate to be permitted. The capture cannot be maintained.'

In another case—that of the 'Maria'—Lord Stowell said :—

'It might likewise be improper for me to pass over entirely without notice, as another preliminary observation, though without meaning to lay any particular stress on it, that the transaction in question took place in the British Channel, close upon the British coast, a station over which the Crown of England has from pretty remote antiquity always asserted something of that special jurisdiction which the sovereigns of other countries have claimed and exercised over certain parts of the seas adjoining to their coasts.'

He would now refer their Lordships to an opinion expressed by Sir John Nicholl on a claim by a lord of a manor to goods derelict. Sir John said :—

'As to the right of the lord extending three miles beyond low water, it is quite extravagant as a jurisdiction belonging to any manor. As between nation and nation, the territorial right may, by a sort of tacit understanding, be extended to three miles ; but that rests upon different principles—viz., that their own subjects shall not be disturbed in their fishing, and particularly in their coasting trade and communications between place and place during the war. They would be exposed to danger if hostilities were allowed to be carried on between belligerents nearer to the shore than three miles.'

A case occurred when the Duke of Wellington held the office now held by his noble friend (Earl Granville). In 1829, within three miles of one of the Cinque Ports, some fishermen at sea were fortunate enough to discover a whale valued at 370*l*. A claim to the fish was made by the Lord Warden, and the Admiralty claimed against him. The learned judge who tried the question came to the conclusion that the office of Lord Warden of the Cinque Ports was more ancient than that of Lord High Admiral, and the Lord Warden of the Cinque Ports succeeded in carrying away the whale. What were the views of Dr. Lushington? He said :—

'What are the limits of the United Kingdom? The only answer I can conceive to that question is—the land of the United Kingdom and three miles from the shore.'

Again, the same learned judge, speaking on the question of compulsory pilotage, said :—

'The Parliament of Great Britain, it is true, has not, according to the principles of public law, any authority to legislate for foreign vessels on the high seas, or for foreigners out of the limits of British jurisdiction ; though, if Parliament thought fit to do so, this Court, in its instance jurisdiction at least, would be bound to obey. In cases admitting of doubt, the presumption would be that Parliament intended to legislate without violating any rule of International Law, and the construction has been accordingly. Within, however, British jurisdiction, namely, within British territory, and at sea within three miles from the coast, and within all British rivers *intra fauces*, and over foreigners in British ships, I apprehend that the British Parliament has an undoubted right to legislate.'

Then he would add to that the opinion of the late Lord Wensleydale in

that House in '*Gammell v. The Commissioners of Woods and Forests*,' a well-known Scotch salmon-fishery case :—

'It may be worth while to observe that it would be hardly possible to extend it seaward beyond the distance of three miles, which, by the acknowledged law of nations, belongs to the coast of the country, is under the dominion of the country by being within cannon range, and so capable of being kept in perpetual possession.'

In advising that House in another case, a noble and learned friend (Lord Chelmsford), whom he was glad to see there to-night, and who held the office which he (the Lord Chancellor) had the honour to hold, said :—

'The three-miles limit depends upon a rule of International Law, by which every independent State is considered to have territorial property and jurisdiction in the seas which wash their coast within the assumed distance of a cannon shot from the shore.'

He would add to that the opinion expressed by another noble and learned friend of his (Lord Hatherley), whom he was also glad to see there. His noble and learned friend, in the case of a collision between a foreign and a British ship, said :—

'With respect to foreign ships, I shall adhere to the opinion which I expressed in "*Cope v. Doherty*," that a foreign ship meeting a British ship on the open ocean cannot properly be abridged of her rights by an Act of the British Legislature. Then comes the question, how far our Legislature could properly affect the rights of foreign ships within the limits of three miles from the coast of this country. There can be no possible doubt that the water below low-water mark is part of the high sea. But it is equally beyond question that for certain purposes every country may, by the common law of nations, exercise jurisdiction over that portion of the high seas which lies within three miles from its shores.'

In the case of the '*Free Fisheries of Whitstable v. Gann*,' Sir William Erle said :—

'The soil of the sea-shore to the extent of three miles from the beach is vested in the Crown.'

Now, these were the opinions—and as far as he was aware there was no opinion in the other way—of the eminent judges who had considered this subject. He said he would inform their Lordships what had been done in the way of legislation. He might refer their Lordships to many Acts of Parliament, but he would only refer to one. He would take the last edition of the Foreign Enlistment Act. That was an Act which, if the words '*deliberation*,' '*care*,' might ever be applied to the passing of an Act, might be applied to the passing of it. It was brought forward by the Government of the day under the advice of its legal advisers. It had also the gravest consideration from many persons outside the Government. What that Act did was this: it provided that '*this Act shall extend to all the dominions of her Majesty, including the adjacent territorial waters*.' He had troubled their Lordships with these references because he felt bound, after the doubts supposed to be cast on the question, to establish the position that their Lordships were entitled to legislate as he proposed. The right which we claimed over the high seas was a right which we had always exercised, and he asked their Lordships to pass an Act for the purpose of obviating the doubts he had pointed out. Her Majesty's Government did not wish to make any new enactment as regarded the case of British subjects within the territorial waters of this country. No person doubted the full jurisdiction of the Crown over them. It

was only in the case of those who were not British subjects that doubts had been expressed. With regard to those who might be foreigners, and temporarily within the three-mile limit, her Majesty's Government wished that there should not be an absolute necessity of proceeding against them for a breach of our law. They proposed to enact that an offence committed by a person who was not a subject of her Majesty on the open sea within the territorial waters of her Majesty's dominions, although the offence might have been committed on board a foreign ship, might, with the consent of one of the principal Secretaries of State, be tried by a British tribunal.

Lord Selborne said that as far as the case connected with the 'Franconia' proceeded on a technical ground for the trial of a criminal offence on the high seas, within the territorial waters of this country, he did not profess to entertain an opinion which would entitle him to criticise the judgment of the majority of the judges ; but he must say that on reading that judgment some doubt was entertained as to the existence in principle of the territorial right properly so called in the Sovereign of this country over waters which all writers on International Law had regarded as territorial waters. It was by the general consent of nations that the three-mile limit had been fixed, and within that limit other nations claimed exactly the same jurisdiction and rights that we ourselves claimed. The Bill proposed, very properly, to assert our right to punish criminal offences committed within that limit, and much prudence was shown in not seeking to extend by this measure our jurisdiction for this purpose beyond the three-mile limit. It had been argued that, in consequence of the increase in the range of artillery, that limit should be extended to five or even six miles ; but although that might be a very sensible alteration to make in International Law, it should only be effected by the general consent of all nations.

On the motion for the second reading of this Bill,

The Lord Chancellor wished to correct a misapprehension which appeared to have prevailed out of doors in reference to his statement on introducing the Bill. It appeared to be supposed that he had stated to their Lordships that the judges who decided the 'Franconia' case had overlooked an Act of Parliament, and that if the Act had not been overlooked there might have been a different decision. What he had stated was this. He had read to their Lordships a passage from the judgment of Mr. Justice Lush, in which the position was laid down that if Parliament had legislated in reference to the waters where the collision had occurred it would have conferred jurisdiction on the Court. In reference to that statement he (the Lord Chancellor) pointed out that under the Regulation Customs Act of 1848 the Commissioners of the Treasury made an order declaring the limits of the port of Dover to extend three miles out to sea, and that the collision had occurred within that limit. But that order could not possibly be known to the learned judges unless it had been specially brought under their notice. It was not known to himself until a gentleman connected with one of the public offices had called his attention to the subject. He did not wish it to be supposed that he had said that the learned judges had overlooked anything which should have properly come under their notice.

CHAPTER VII

RIGHTS OF LEGISLATION AND JURISDICTION

1. Exclusive power of civil and criminal legislation—2. Law of real property—3. Law of personal property—4. Law of contracts—5. Exceptions to rule of comity in contracts—6. Rule of judicial proceeding—7. Law of personal capacity and duty—8. *Droit d'aubaine* and *droit de rétraction*—9. Right of aliens to hold land—10. Foreign marriages—11. Foreign divorces—12. Laws of trade and navigation—13. Laws of bankruptcy—14. Law of treason and other crimes—15. Judicial power of a State—16. Jurisdiction with respect to actions—17. Jurisdiction of a State over its own citizens—18. Over alien residents—19. Over real property—20. Over personal property—21. Rule of decision in case of personal property—22. Distinction between contracts *inter vivos* and *mortis causa*—23. Between assignments in bankruptcy and voluntary assignments—24. Jurisdiction over public and private vessels on the high seas—25. Public armed vessels and their prizes in foreign ports—26. Private vessels in foreign ports—27. Summary of the judicial powers of a State—28. Extradition of criminals—29. Extra-territorial operation of a criminal sentence—30. Conclusiveness of foreign judgments in personal actions—31. Conclusiveness of foreign judgments *in rem*—32. Foreign courts, how far exclusive judges of their own jurisdiction—33. Proof of foreign laws—34. Proof of foreign contracts and instruments—35. Of foreign judgments and documentary evidence—36. Slavery.

Exclusive
power of
legisla-
tion

§ 1. We have already remarked that the exclusive power of civil and criminal legislation is one of the essential rights of every independent and sovereign State. An infringement upon this right is a limitation of the natural sovereignty of the State, and if extended to a general denial of this power, it is justly considered as depriving the State of one of its most essential attributes, and as reducing it to the position of dependence upon the will of another. In such a case it can no longer claim to be numbered among independent and sovereign States, for it no longer possesses the attributes necessary to entitle it to rank as such among the nations of the world, viz.: *the right to exercise its volition*, and the capacity to contract obligations.¹

¹ See *ante*, ch. iii. § 1, and ch. iv. § 14.

§ 2. This sovereign right of legislation extends (with the exceptions hereafter to be mentioned) to the regulation of all real or immovable property¹ within the territorial limits of the State, no matter by what title such property may be held, or whether it belongs to aliens or to citizens of the State. The law of the place where real or immovable property is situate, or the *lex loci rei sitæ*, governs in everything relating to the tenure, title, and transfer of such property. Hence it is that the descent, devise, or conveyance of real property, in a foreign country, must be governed by, and executed according to, the local laws of the State where such property is situate. And where these local laws prescribe as to instruments for the transfer of real property, particular forms which can only be observed in the place where it is situated, such as the registry of a deed, or the probate of a will, the transfer cannot be executed in a foreign country. By the rules of international jurisprudence, recognised among the different nations of the European continent, if the *lex loci rei sitæ* allows the property to be alienated by deed or will, and does not require forms to be necessarily observed in the place where it is situated, the deed or will may be executed according to the law of the place where it is made. But the application of the rule is less liberal in Great Britain and the United States, the formalities required by the laws of the States where the land lies being essential to the validity of the transfer.²

§ 3. With respect to personal or movable property, the same rule (*lex loci rei sitæ*) generally prevails, except that the law of the place where the person to whom it belonged was domiciled at the time of his decease governs those circum-

¹ In England the simple division into immovable tenements and movable chattels is lost in the many exceptions to which time and altered circumstances have given rise. Thus shares in canals and railways which are sufficiently immovable are generally personal property, funded property is personal, whilst a dignity or title of honour, which one would think to be as locomotive as its owner, is not a chattel, but a tenement (William, *Real Property*, p. 8). It must, therefore, be borne in mind that in international law the term *personal* property is restricted to what is *movable* property, and no more.

² Wheaton, *Elem. Int. Law*, pt. ii. ch. ii. § 3; Story, *Conflict of Laws*, §§ 364-373, 428-483; Robinson v. Campbell, 3 Wheat. R., 217; United States v. Crosby, 7 Cranch R., 115; Coppin v. Coppin, 2 P. W. R., 291; Brodie v. Barry, 2 Ves. and Beam. R., 127; Dundas v. Dundas, 2 Dow. and Cl. R., 349; Johnson v. Tirol, 1 Russ. and My. R., 244.

stances or acts in which movables appear as an accessory of the person—for example, in the case of the succession, *ab intestato*, to his personal effects. So, also, the law of the place where any will, transfer, marriage, contract, disposition *inter vivos* or *mortis causa*, or other instrument relating to personal property is executed, by a person domiciled in that place, governs, as to the form, execution and interpretation of the instrument ; *lex loci domicilii regit actum*. The rule is founded on the maxim that personal property has no locality, but adheres to the person of its owner ; *mobilia personam sequuntur*. There are exceptions to this rule : *first*, in cases where the local or customary law of the place gives to the particular property a necessarily implied locality ; and *second*, in special cases provided for by local statutes. Thus, by the laws of some countries, certain movables are considered as annexed to immovables, either by incorporation or as incidents, and therefore partake of the character of the latter, such as fixtures of personal property in houses under the English common law. Heritable bonds, ground rents, and other rents on land are ranked, by the Scottish laws, among the class of immovables. Contracts respecting public funds, or stocks, may be required to be carried into execution according to the local law ; and the same rule may properly apply to the transfer of shares in bank, insurance, canal, railroad, and other companies, which owe their existence to, and are regulated by, peculiar local laws. Subject to these, and to those exceptions in which movables have no intimate relation to the person of the owner—for example, where the property is claimed or disputed, when the maxim that *en fait de meubles possession vaut titre* is invoked, when the question is about a right of pledge, a claim to preferential payment, process of execution, the inalienability of movables, their confiscation, escheat of a movable succession to the public treasury or a prohibition against exporting movables, and to all of which the *lex loci rei sitæ*, or law of the place where the movables are actually found, must be applied—the general rule is that a transfer of personal property, good by the law of the owner's domicile, is valid wherever it may be situate.¹

¹ Huberus, *Prælect.*, lib. i. tit. iii. §§ 14, 15 ; Foelix, *Droit Int. Privé*, § 62 ; U. S. v. Bank of U. S., 8 Rob. R., 262 ; Black v. Zacharie, 3 ;

§ 4. The general law of contracts is, that the validity of every contract is to be decided by the law of the place where it is made, or, in legal phraseology, the *lex loci contractûs* is to govern in everything respecting the form, interpretation, obligation, and effect of the contract.¹ ‘The rule,’ says Story, ‘is founded, not merely in the convenience, but in the necessities of nations ; for, otherwise, it would be impracticable for them to carry on an extensive intercourse with each other. The whole system of agencies, purchases and sales, credits, and negotiable instruments, rests on this foundation ; and the nation which should refuse to acknowledge the common principles, would soon find its whole commercial intercourse reduced to a state like that in which it now exists with savage tribes.’ In this, as a general principle, there seems a universal consent of courts and jurists, foreign and domestic. The same rule applies, *vice versâ*, to the invalidity of contracts : if void or illegal by the law of the place of the contract, they are generally held void and illegal everywhere.

We have already mentioned exceptions to this rule, in the transfer of real property, which is governed by the *lex loci rei sitæ*, and in the transfer of immovable property, which, though generally governed by the *lex domicilii*, is, in some cases, subject to the same rule as real property. The *lex loci contractûs* cannot apply to the personal *status* and capacity of the citizens of a State, or to cases where it would conflict with the laws of another State in respect to its police, its health, its commerce, its revenue, and generally its sovereign authority, and the rights and interests of its citizens. ‘These exceptions,’ says Story, ‘result from the consideration that the authority of the acts and contracts done in other States are not, *proprio vigore*, of any efficacy beyond the territories of that State, and whatever is attributed to them elsewhere is from comity and not of strict right ; and every independent community will, and ought to, judge for itself how far

Howard R., 483 ; *Sill v. Worswick*, 1 *H. Bl. R.*, 665 ; *Cammel v. Sewell*, 5 *H. and N.*, 728 ; *Moultrie v. Hunt*, *N. Y.*, 394 ; *Wallace v. Attorney-General*, *L. R.* 1, ch. i. ; Story, *Conflict of Laws*, § 383.

¹ But such contract cannot be enforced in England unless such evidence as the English law requires be produced. Thus where the Statute of Frauds requires evidence *in writing*, such evidence must be forthcoming, although the *lex loci contractûs* does not require it (*Leroux v. Brown*, 12 *C. B.*, 801).

that comity ought to extend. The reasonable limitation is, that it shall not suffer prejudice by its comity. Mr. Justice Best has, with great force, said that, in cases turning upon the comity of nations (*comitas inter communitates*), it is a maxim that the comity cannot prevail in cases where it violates the law of our own country, the law of nature, or the law of God. Contracts, therefore, which are in evasion or fraud of the laws of a country, or the rights or duties of its subjects, contracts against good morals, or religion, or public rights, and contracts opposed to the national policy or institutions, are deemed nullities in every country affected by such considerations, although they may be valid by the laws of the place where they are made.'¹

Excep-
tions to
the rule
of comity

§ 5. But, with regard to these exceptions to the rule of international comity as applicable to contracts of personal property, it must be remembered that the rule is based, not on the conformity, but on the repugnancy of the laws of different States. When, therefore, it is said that contracts opposed to the national policy and institutions of a State, or to good morals, are excepted from the general rule of comity, it is not meant that all contracts unauthorised by or opposed to the *laws* of a State are thus excepted. Comity is the general rule, and the exceptions are strictly limited so as not to affect the principle which is recognised and established by the rule. Thus, it is held in Massachusetts that a contract for the sale and delivery of slaves in a foreign State where such sale is not prohibited, may be sued in another State where slaves cannot be imported. But, if the delivery was to be in a State where the importation was interdicted, the contract could not be sued on in the interdicting State, because the giving of legal effect to such a contract would be repugnant to its rights and interests. So of contracts opposed to good morals ; marriages not naturally unlawful, but prohibited by the law of one State, and not of another, if celebrated where they are not prohibited, would be holden valid in a

¹ Kent, *Com. on Amer. Law*, vol. ii. pp. 454, 455 ; Bouhier, *Les Coutumes*, &c., ch. xxi. § 190 ; Forbes *v.* Cochrane, 2 *B. and C.*, 448-471 ; Massé, *Droit Commercial*, tom. ii. §§ 77 et seq. ; Riquelme, *Derecho Púb. Int.*, lib. ii. tit. i. cap. iv. ; Gardner, *Institutes*, pp. 122 et seq. ; Thompson *v.* Powles, 2 *Sim.*, 194 ; Santos *v.* Illige, 8 *C. B.* (N. S.), 861 ; and see cases to the contrary, Bazett *v.* Meyer, 5 *Taunt.*, 824 ; Sharp *v.* Taylor, 2 *Ph.*, 801.

State where they are not allowed if the parties were not domiciled in the latter State. In Massachusetts a marriage between a man and his deceased wife's sister is lawful, but it is not in some States of the Union. Such a marriage celebrated there would be held valid in any other State of the Union, and the parties entitled to the benefits of the matrimonial contract. But if a foreign State allows of incestuous marriages between parent and child, such marriage could not be allowed to have validity in any Christian State. In an action on a contract made in a foreign State by a prostitute to recover the wages of her prostitution, this contract, if lawful where it was made, could not necessarily be the legal ground of an action elsewhere ; for the consideration is confessedly immoral, and a judgment in support of it would be pernicious from its example. And, perhaps, all cases may be considered within this exception which are founded on moral turpitude, in respect either of the consideration or the stipulation. It is thus seen that these exceptions, with respect to national policy and good morals, must, in the first case, be limited to contracts the execution of which would be repugnant to its interests and rights of sovereignty ; and, in the second case, those which are founded on moral turpitude, in respect either of the consideration or the stipulation. So, when it is said that the rule of comity does not apply to contracts made in evasion or fraud of the laws of a country, or of the rights and duties of its subjects, it is not meant that all contracts made in conformity with laws of the place of the contract (but which would have been void if made in the place of the forum, as being prohibited by its laws) are excepted from that rule. In *certain cases* where the law of a State prohibits particular kinds of voluntary assignments for the benefit of creditors, it has been held that those made in foreign States, and which come within the prohibition, although valid by the law of the place where made, will not be sustained in the forum of the State so prohibiting them. But the exception in those cases is not made on the ground of repugnancy in the laws of the two places, for that would, as has already been shown, make the exception the general rule, and destroy the very foundation of the law of international comity. The exception, with respect to personal property when made, has been based on the fact that the foreign

assignment was injurious to the rights and interests of *citizens* of the *prohibiting State*, and it has been limited to *property within its jurisdiction* at the time of the assignment, and held by the law as *pledged* for the payment of debts due *within* the State.¹

Rule of
judicial
proceed-
ings

§ 6. But while the law of the place where the contract is made must generally determine the obligation of the contract, the law of the place where the suit is pending must regulate the remedy, or manner of proceeding to enforce the obligation. Thus, if a contract made in one country is attempted to be enforced, or comes incidentally in question, in the judicial tribunals of another, everything relating to the forms of proceeding, and the rules of evidence, to limitation or prescription, and to the execution of judgments, is to be determined solely and exclusively by the law of the State where the proceeding is pending. In general terms, it may be stated that the obligations of a contract are to be determined by the *lex domicilii* or *lex loci contractus*, and the proceeding or remedy for enforcing it by the *lex fori*. 'The reasons for this doctrine,' says Justice Story, 'are so obvious, that they scarcely require any illustration. The business of the administration of justice by any nation is, in a peculiar and emphatic sense, a part of its public right and duty. Each nation is at liberty to adopt such a course of proceeding as best comports with its convenience and interests, and the interests of its own subjects, for whom its laws are particularly designed. The different kinds of remedies, and the modes of proceeding best adapted to enforce rights and guard against wrongs, must materially depend upon the structure of its own jurisprudence. What would be well adapted to the jurisprudence, customary and positive, of one nation, for rights which it recognised, or for duties which it enforced, might be wholly unfit for that of another nation, either as having gross defects, or steering wide of the appropriate remedial justice. All that a

¹ Westlake, *Private Int. Law*, ch. vi. ; Story, *Conflict of Laws*, §§ 245, 246 ; Burrill, *On Assignments*, p. 336 ; Greenwood *v.* Curtis, 6 *Mass. R.*, 378 ; Zipcey *v.* Thompson, 1 *Gray R.*, 243 ; Ingraham *v.* Geyer, 13 *Mass. R.*, 147 ; Varnum *v.* Camp, 1 *Green R.*, 326 ; Thuret *v.* Jenkins, 7 *Martin R.*, 353 ; Richardson *v.* Leavitt, 1 *Lou. Ann.*, p. 430 ; Whitenwright *v.* Leavitt, 4 *Lou. Ann.*, p. 252 ; U. S. *v.* Bank of U. S., 8 *Rob. R.*, 262 ; Black *v.* Zacharie, 3 *Haw. R.*, 483 ; Forbes *v.* Scannel, 13 *Cal. R.*, 242 ; Biggs *v.* Lawrence, 3 *T. R.*, 454 ; Grek *v.* Levy, 16 *C. B. (N.S.)*, 73.

nation can, therefore, be justly required to do is to open its own tribunals to foreigners, in the same manner and to the same extent as they are open to its own subjects, and to give them the redress, as to rights and wrongs, which it deems fit to acknowledge in its own municipal code for natives and residents.'¹

§ 7. The right of municipal legislation of a sovereign State extends to everything affecting the State and capacity of its own subjects, with respect to their personal rights within its own territory, and also, with certain exceptions, to the regulation of the conduct of all persons within its jurisdiction, whether subjects or foreigners. Moreover, these municipal laws, in some cases, operate beyond its territorial jurisdiction, with respect to the condition and personal capacity of its citizens, when resident in a foreign country; such as the qualities of citizenship, legitimacy, and illegitimacy, minority and majority, idiocy, lunacy, marriage and divorce. The laws of a State, with respect to these qualities or capacities of its subjects, travel with them wherever they go, and attach to them in whatever country they are resident. But it must be observed that the municipal laws of one State cannot interfere with any rights its subjects may acquire, or privileges they may enjoy, under the laws of another State, while they are resident in such foreign State, and without the jurisdiction of their own country. The same rule applies to personal duties and obligations. A citizen of one country, naturalised or domiciled in another State, enjoys the rights and privileges given him by the State where he is so naturalised or domiciled. The laws of his native country cannot affect him personally so long as he is without its jurisdiction. But if he return to his native country, and place himself within its jurisdiction, it has usually been held that he becomes not only subject to its laws generally, but also to the duties and obligations of his primitive allegiance. But this question will be more particularly considered in the chapter on national character.²

¹ Story, *Conflict of Laws*, §§ 556-7; Boullenois, *Traité des Lois*, &c., tom. ii. p. 462; Robinson v. Bland, 2 Burr. R., 1084; Fenwick v. Sears, 1 Cranch R., 259; Peninsular and Oriental Steam Navigation Company v. Shand, 3 Moore P.C. (N.S.), 290; Di Sora v. Phillips, 10 H. of L., 633. See Duncan v. Campbell, 12 Sim., 616, as to interpretation of Scotch deed according to English legal terms.

² *Infrà*, ch. xii.; Martens, *Précis du Droit des Gens*, §§ 92 et seq.;

Droit
d'aubaine
and droit
de
rétraction

§ 8. In the darkness of the Middle Ages, the rule called *jus albinatûs*, or *droit d'aubaine*, was established, by which all the property of a deceased foreigner, whether movable or immovable, was confiscated to the use of the State, to the exclusion of his heirs, whether claiming *ab intestato* or under a will of the deceased. But the progress of civilisation has almost entirely abolished this barbarous and inhospitable usage. Judge Story expresses a doubt if it is now recognised by any of the civilised nations on the earth. The analogous usage of the *jus detractûs* or *droit de rétraction*, by which a tax was levied upon the removal from one State to another of property acquired by succession or devise, has also been reciprocally abolished in most civilised countries.¹

Law of
escheat

§ 9. The rules of international and municipal law, with respect to foreigners holding real estate, are less liberal and just than with respect to their personal property. It seems to have been the universal rule of civilised society that when the owner of property died intestate and left no heirs, it should vest in the public, and be at the disposal of the Government. Where, therefore, the deceased left no heirs capable of succeeding to his estate, as in the case of an alien, it vested in the State. The rules of English law, with respect to the rights of alien heirs to inherit property, were formerly illiberal in their nature and effects, but they were modified in 1870 by 33 and 34 Vict., c.14. This statute enacts that real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien in the same manner in all respects as through, from, or in succession to a natural-born British subject. This does not confer any right on an alien to hold real property situate out of the United Kingdom, nor does it qualify him for any office or for any municipal, Parliamentary, or other franchise; nor does it entitle him to any right or privilege as a British subject, except such

Bello, *Derecho Internacional*, pt. i. cap. iv. §§ 3-5; Westlake, *Private International Law*, ch. xiii.

¹ Mayer, *Corp. Jur. Germ.*, tom. ii. p. 17; Merlin, verb. 'aubaine'; Martens, *Précis du Droit des Gens*, § 90; Massé, *Droit Commercial*, tom. ii. §§ 8-14; Bacquet, *Droit d'Aubaine*, chs. ii. et seq.; Cushing, *Opinions of U. S. Attys.-Genl.*, vol. viii. p. 411.

rights and privileges in respect of property as are above expressly mentioned. The harsh rules against aliens have also been limited in most of the States of the American Union by the decisions of courts and statutory dispositions. The American Union, as such, has no law of succession, of inheritance, of descent, of filiation, or of tenure of land, whether in the case of citizens of the United States or of foreigners. Relationship, inheritance, testaments, successions, tenure of estates real and personal, all these are questions of the local law of the individual States. In their treaties with foreign countries, the United States have stipulated against the application of the right of escheat, or the *droit d'aubaine*, to aliens claiming real estate by descent in the United States, and that the descent should be the same as if such foreigner were not disqualified by alienage. It has, however, been contended by some that the Federal Government has no power, under the Constitution, to abrogate by treaty an incompatible law of either of the States, and that the State laws must control in such matters, notwithstanding the provisions of treaties. But the courts have generally held that such treaties are within the powers of the Union. And now aliens are able to hold land in most European States, either without any conditions, or on the condition of reciprocity, granted by the Government of the alien.¹

§ 10. By the laws of some countries, marriage is considered in no other light than as a civil contract, while in others it becomes a religious as well as a natural or civil contract ; ' for it is a great mistake,' says Story, ' to suppose that because it is the one, therefore it may not likewise be the other.' The Roman Catholic Church holds it to be a sacrament, although the parties—not the priest—are the ministers. Protestants do not, as a rule, do so ; they account it as of Divine origin, and invest it with the sanction of religion. Yet all decisions attest that, however deeply the religious nature of marriage may engage the affections of the community, the law leaves

¹ *Report of Naturalisation Commission*, 1869 ; Bouvier, *Law Dictionary*, verb. 'escheat ;' Kent, *Com. on Amer. Law*, vol. iv. p. 420 ; Blackstone, *Commentaries*, vol. ii. p. 244 ; Fairfax's Lessee *v.* Hunter's Lessee, 7 *Cranch R.*, 627 ; Ware *v.* Hilton, 3 *Dall. R.*, 242 ; Chirac *v.* Chirac, 2 *Wheat. R.*, 259 ; Orr *v.* Hodgson, 4 *Wheat. R.*, 453 ; the 'Society,' &c. *v.* New Haven, 8 *Wheat. R.*, 464 ; Hughes *v.* Edwards, 9 *Wheat. R.*, 489 ; Banks *v.* Carneal, 10 *Wheat. R.*, 181 ; Henks *v.* Dupont, 3 *Peters. R.*, 242 ; the People *v.* Gerke, 5 *Cal. R.*, 381.

this nature to the sole care of religion, and contemplates it only as a civil institution. Naturally, therefore, to distinguish marriage as the law views it from marriage as a religious rite, the courts and text-writers almost uniformly describe it as a 'contract,' or 'civil contract.' Thus Shelford ('Mar. & Div.,' 1) says: 'Marriage is considered in every country as a contract, and may be defined to be a contract according to the form prescribed by the law, by which a man and woman capable of entering into such a contract mutually engage with each other to live their whole lives together in a state of union which ought to exist between a husband and his wife.' Again, it is said by Rogers ('Eccl. Law,' tit. 'Marriage'), that 'marriage is a contract having its origin in the law of nature antecedent to all civil institutions, but adopted by political society and charged thereby with various civil obligations. It is founded on mutual consent, which is the essence of all contracts, and is entered into by two persons of different sexes with the view to their mutual comfort and support and for the procreation of children.' Other definitions give the idea of a contract a more subordinate position. Thus Ayliffe ('Parer.,' 359) says: 'Marriage is a lawful coupling and joining together of a man and woman in one individual state, or society of life, during the lifetime of one of the parties; and this society of life is contracted by the consent and mutual goodwill of the parties towards each other.' And the authorities agree in distinguishing it from other species of contract.

Marriage is a personal consensual contract, and is a contract *sui generis*, and differs from other contracts in this, that the rights and obligations, or duties arising from it, are not left entirely to be regulated by the agreement of parties, but are, to a certain extent, matters of municipal regulation, over which the parties have no control by any declaration of their will; and, unlike other contracts, it cannot, in general, be dissolved by mutual consent. It is, therefore, evident that the rules of law applicable to other contracts cannot always be resorted to in expounding and enforcing the marriage contract. It may, however, be laid down as a general principle that the *lex loci*, or law of the place where the marriage is celebrated, governs the *formalities* of the marriage-contract; and therefore if a marriage be celebrated according to the

forms of the place, the marriage is—subject to the *essentials* of the contract—everywhere valid. But it does not *necessarily* follow that a marriage celebrated according to the form and rites of the *lex domicilii* of the parties, or celebrated otherwise than in accordance with the formalities of the *lex loci*, is always void. Thus, the matrimonial law of Jews in England is their own matrimonial law. In the English factories at Lisbon, Leghorn, Oporto, Cadiz, and in factories in the East, Smyrna, Aleppo, and others, in all of which (some of these establishments existing by authority under treaties, and others under indulgence and toleration) marriages are regulated by the law of the original country to which they are still considered to belong. A marriage of the orthodox Greek Church in Turkey depends on the canons of that Church without reference to Mahometan ceremonies. On the same principle marriages of foreign subjects in the houses of their ambassadors, or on board of their ships of war, or within the lines of their army in a foreign country, are sanctioned and are reputed to be valid. In all these cases the formalities of the *lex domicilii* are observed. Lord Stowell remarks that if such practice ‘had been sanctioned by long acquiescence and acceptance of the one country that has silently permitted such marriages, and of the other that has silently accepted them, the courts of this country, I presume, would not incline to shake their validity upon these large and general theories, encountered as they are by numerous exceptions in the practice of nations.’¹ The *lex domicilii*, or law of the place where the parties are domiciled, governs the *essentials* of the marriage contract. And if by the latter law it be declared that the wanting of certain essentials invalidates a marriage, the marriage (although by municipal law it may be valid in the country where celebrated) is void in the country of the domicile. The above principles are maintained by the European States generally, and, since 1858, by Great Britain also.²

¹ *Ruding v. Smith*, 2 *Consist.*, 390.

² *Brook v. Brook*, 9 *H. L. Rep.*, 212.

Two Portuguese cousins contracted, in London, marriage, illegal by the law of Portugal on the ground of consanguinity, and returned to Portugal and continued to reside there; they never cohabited. The Court of Appeal declared the nullity of the marriage, determining that if the parties had been English subjects, domiciled in England, the marriage

The United States of America maintain the opinion formerly received in Great Britain that both the *formalities*

would undoubtedly have been valid, but that it was a well-recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicile. It was urged that this did not apply to the contract of marriage, and that a marriage valid according to the law of the country where it was solemnised was valid everywhere. The Court held that the law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted ; and further, that, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile ; if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this imposes on the subjects of that country a personal incapacity which continues to affect them so long as they are domiciled in the country where the law prevails, and renders invalid a marriage between persons, both being at the time of their marriage subjects of and domiciled in the country which imposes the restriction, wherever such marriage may have been solemnised. In the argument, several passages from Story's *Conflict of Laws* were referred to in support of the contention, that in an English court a marriage between persons who by that law may lawfully intermarry ought not to be declared void, though declared incestuous by the law of the parties' domicile, unless the marriage is one which the general consent of Christendom stamps as incestuous. The Court deemed that it is hardly possible to suppose that the law of England, or of any Christian country, would consider as valid a marriage which the general consent of Christendom declared to be incestuous, and that probably the true explanation of the passages in Story is given in *Brook v. Brook* (9 *H. L. C.*), at pp. 241-2—viz. that Story is referring to marriages not prohibited or declared to be invalid by the Municipal Law of the country of domicile ; it was said that the impediment imposed by the law of Portugal could be removed by a Papal dispensation, and, therefore, that it could not be said that there was a personal incapacity of the petitioner and respondent to contract marriage. But the evidence was clear that, by the law of Portugal, the impediment to the marriage between the parties was such that, in the absence of a Papal dispensation, the marriage would be by the law of that country void as incestuous. The statutes of the English Parliament contain a declaration that no Papal dispensation can sanction a marriage otherwise incestuous ; but the law of Portugal does recognise the validity of such a dispensation, and in the opinion of the Court it could not be held that such a dispensation is a matter of form affecting only the sufficiency of the ceremony by which the marriage is effected, or that the law of Portugal, which prohibits and declares incestuous, unless with such a dispensation, a marriage between the petitioner and respondent, does not impose on them a personal incapacity to contract marriage. It was proved that the Courts of Portugal, where the petitioner and respondent were domiciled and resident, would have held the marriage void, as solemnised between parties incapable of marrying, and incestuous ; therefore, how could the Courts of Great Britain hold the contrary, and, if appealed to, say the marriage was valid ? It was pressed in argument that a decision in favour of the petitioner would lead to many difficulties, if questions should arise as to the validity of a marriage between an English subject and a foreigner, in consequence of prohibitions imposed by the law of the domicile of the latter. The opinion of the Court on this appeal was confined to the case when both the contracting parties are at the time of their marriage domiciled in a

and the *essentials* are to be decided by the *lex loci*, and that the *lex domicilii* has no voice in the matter.

But there are certain exceptions to the general International rule,¹ the most prominent of which are those of

country the laws of which prohibit their marriage. All persons are legally bound to take notice of the laws of the country where they are domiciled. No country is bound to recognise the laws of a foreign State when they work injustice to its own subjects, and this principle, the Court explained, would prevent the judgment in the present case being relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England, on the ground of any personal incapacity not recognised by the law of this country ; if *Brook v. Brook* (9 *H. L.*, 212) had been a decision on the question arising on this petition, it would have been sufficient without more to refer to it as decisive, but the judgment in that case only decided that the English Courts must hold invalid a marriage solemnised abroad between two English subjects domiciled in England who were prohibited from intermarrying by an English statute, even though the marriage were solemnised during a temporary sojourn in a foreign country (*Sottomayor v. De Barros*, *L. R.*, 3 Prob. Div., 1).

The Court of Appeal having thus declared the marriage null on questions of *law*, certain questions of *fact* raised by the Queen's Proctor were determined by the Court of Probate. The Court held that there had been no fraud or collusion between the parties, but that they had intended to contract marriage, and that the domicile of the husband was at that time in England. Further, that the validity of a marriage in England must, though the domicile of one of the parties be foreign, be decided according to the law of England ; that marriage is based upon the contract of the parties, but it is also a status arising out of the contract, to which each country is entitled to attach its own conditions both as to its creation and duration ; that the ignorance of the parties as to the effects of Portuguese law upon the validity of the ceremony could not affect the validity of the marriage, and that the marriage was lawful. (*Sottomayor v. De Barros*, 5 *L. R.*, Prob. Div., 94.)

All marriages contracted by French subjects, detained in foreign countries as prisoners of war, in 1812, were deemed by French law to be totally invalid. (*Ann. Reg.*, vol. 82, p. 153.)

¹ Huberus (lib. i. tit. iii. § 9) declares those marriages invalid which are an evasion or fraud upon the law of the country to which the parties belong, or in which they are domiciled. See also Pothier, *Traité du Mariage*, n. 263. But such marriages were, until 1858, held good in England, and still are in America (*Compton v. Bearcroft*, commented on in *Scrimshire v. Scrimshire*, 2 *Hagg. Consist. R.*, 443 ; *Medway v. Needham*, 16 *Mass. R.*, 157 ; *Putnam v. Putnam*, 8 *Pick. R.*, 433). See *West Cambridge v. Lexington* (1 *Pick. R.*, 596) as to the legitimacy of the issue of a person divorced *a vinculo*, and declared incapable of marrying again, but who had gone into a neighbouring State and contracted a new marriage. Gretna Green and such like clandestine Scotch marriages, for the purpose of evading the English law, were formerly held to be valid on account of the construction of the English statute on marriage ; but it is doubtful if they would be held so now. The question is, however, so far as England is concerned, settled by the 19 and 20 Vict., c. 96, which enacts that such marriage in Scotland shall not be valid 'unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland twenty-one days next preceding such marriage.'

polygamy and incest and of marriages made by a fraudulent evasion of the laws of the State to which the parties belong.

Polygamy and incest are prohibited by the laws of every civilised country. There is, however, a difference of opinion as to what is incestuous and what is not—thus marriage with a deceased wife's sister, or marriage between an uncle and a niece, are both forbidden by the law of England (see 28 Henry VIII., c. 7, s. 11, and 5 & 6 Will. IV., c. 54), yet are permitted in many countries. The English Divorce Court also has refused to entertain a suit for restitution of conjugal rights between Mormons, not recognising the validity of such marriages.¹ And the Supreme Court of Bombay, on its Ecclesiastical side, declared that it would not make decrees concerning Parsee marriages, as it had no means of enforcing them, except in accordance with the principles of the English Matrimonial Law, which were quite incompatible with that of the Parsees.²

According to the decisions in the English and American courts a marriage is said to be *void* when it is good for no legal purpose, and its invalidity may be maintained in any proceeding, in any court, between any parties, whether in the lifetime or after the death of the supposed husband and wife, and whether the question arises directly or collaterally. A marriage is said to be *voidable* when the imperfection can be inquired into only on a proceeding conducted for the purpose of setting it aside during the lifetime of both the husband and wife. Until set aside, it is practically valid; when set aside, it is rendered void from the beginning. The canonical impediments to marriage, such as consanguinity, affinity, and impotence, render it merely voidable in the courts, unless a statute otherwise directs; the civil impediments, such as a prior marriage, idiocy and the like, usually render it void.³

Previously to the decree of the Council of Trent, made in 1563, *De Reformatione Matrimonii*, mere consent of the parties, without any formalities or religious rite, was by the law of Christianity deemed sufficient for the validity of a

¹ Hyde *v.* Hyde, 1 *L. R.*, P. and D., 132.

² Ardaseer Cursetjee *v.* Perazeboye, 10 *Moore P. C.*, 374.

³ Shelf, *Mar. and Div.*, 479; Wilson *v.* Brockley, 1 *Phil.*, 132; Patterson *v.* Gaines, 6 *How. U. S.*, 550; Bonham *v.* Badgley, 2 *Gill.*, 622; Perry *v.* Perry, 2 *Paige*, 501; Elliott *v.* Gurr, 2 *Phill.*, 16; Jaques *v.* Public Admin., 1 *Brad.*, 499.

marriage. But this decree of this Council concerning marriage has not been received, and therefore is not binding, in many countries—England among others. It seems, however, to have been the Common Law of England (and perhaps of Ireland) that, in order for a man to obtain rights over his wife's property, or for a woman to become entitled to dower, the consent of the parties should be given in the presence of some person episcopally ordained, not necessarily a priest, nor willingly listening to the giving of the consent, nor being in a church.

Marriages by mere consent were abolished in England in 1753 by Lord Hardwick's Act (26 Geo. II., c. 33), and this Act was extended to Ireland by the 58 Geo. III., c. 81. In Scotland, marriages by mere consent entitled the parties to all the rights of property, as fully as if the marriage had been celebrated *in facie Ecclesiæ*. The principal statutes affecting marriages in England at the present time are the 6 & 7 Will. IV., c. 85 ; 7 Will. IV., c. 1 ; 1 Vict., c. 22 ; and 19 & 20 Vict., c. 119 ; and in Scotland the 41 & 42 Vict., c. 43. The reported cases, Dalrymple v. Dalrymple (2 Hagg. Consist., 54) and Reg. v. Millis (10 Cl. & Fin., 534), afford much information on this subject. The *essentials* required by the *lex domicilii* of every country are various. Those exacted by the French law in particular are very numerous. As before stated, the want of such essentials renders a marriage null and void in the country of the domicile. It is not possible to point out here all the essentials required by every country.

With respect to the rights, duties, and obligations arising from the marriage relation, we must, in many cases, look to the law of the domicile. It is, therefore, obvious that the rules of international jurisprudence with respect to this contract are somewhat variable, according to the peculiar circumstances of each case. Moreover, on some questions arising out of this relation, no rule can be said to be yet established, there being a direct conflict in the judicial decisions of different States and in the opinions of the most eminent of text-writers. After a full survey of the writings and cases, foreign and domestic, on this subject, Story lays down the following general rules as the result of his examination :

1. Where there is a marriage in a foreign country, and an express nuptial contract with respect to personal property, it

will be sustained everywhere unless it controvenes some positive rule of law or policy ; but as to real property it will be made subservient to the *lex rei sitæ*. 2. Where such a contract applies to personal property, and there is afterward a change of matrimonial domicile, the law of actual domicile will govern as to future acquisitions. 3. If there be no such nuptial contract, the matrimonial domicile governs all the personal property everywhere, but not the real property. 4. The matrimonial domicile governs as to all acquisitions, present and future, if there be no change of domicile. If there be, then the law of the actual domicile will govern as to future acquisitions, and the law *rei sitæ* as to real property.

But these rules are, according to English jurisprudence, subject to so many qualifications, not within the scope of this work, that the reader is referred to the authorities in the note below.¹

Fore'gn divorces

§ 11. Divorce is the dissolution or partial suspension by law of the marriage relation, the dissolution being termed *a vinculo matrimonii*, a mere suspension or separation being termed divorce *a mensâ et thoro*. When a marriage is not *de jure*, it is void *ab initio* ; but with this subject, and with that of separation, *a mensâ et thoro*, it is not our present purpose to deal. We shall only speak of divorce *a vinculo matrimonii* of parties who have been married *de jure*. This practice obtained with many of the ancient nations, was recognised by the Roman law in B.C. 231. After this time they became common, and were generally obtainable at the pleasure of either of the married parties. Constantine took away this facility of divorce, and laid down a series of rules settling the causes which justified the dissolution of marriage. Justin, in 556, restored the ancient law, and allowed divorce by mutual consent, or at the instance of either party, upon his or her establishing any of the grounds

¹ *Anstruther v. Adair*, 2 *Mylne and Keene*, 513 ; *Byam v. Byam*, 19 *Beav.*, 62 ; *Este v. Smyth*, 18 *Beav.*, 112 ; *Re Wright's Trusts*, 2 *Kay and Johnson*, 595 ; *Duncan v. Cannon*, 18 *Beav.*, 128 ; *Faubert v. Turst*, 1 *Bro. P. C.*, 129 ; *Watts v. Schrimpton*, 21 *Beav.*, 97 ; *M'Cormick v. Garnett*, 5 *De Get.*, M. and G., 278. A 'putative' marriage is a marriage contracted in good faith, but in ignorance of the existence of facts which constitute a legal impediment to the intermarriage. During the Middle Ages there was an intermediate estate between matrimony and concubinage, known by the name of 'morganatic' marriage. It was a lawful and inseparable conjunction of a single man of noble birth with a single woman of an inferior station upon this condition, that neither she nor her children should partake of the title of the husband, nor succeed to his inheritance.

contained in the Imperial Constitutions. This appears to have been the law until the ninth century, at which period divorces were only permitted for some of the causes laid down by Justinian (Code 5, 17, 11, *De Repud.*, Nov. 22, Nov. 117, cc. 8 and 9). The Justinian legislation on the subject of divorce (repeated in the Basilica) was in observance at the time of the Council of Trent (1563), although the decrees of councils and of synods, or the rescripts of Popes, had long endeavoured to determine the unhappy practice. The Council of Trent effectually put an end to it in Western Christendom. But the Orthodox Greek Church, and other Oriental Churches, adhered to the Imperial Constitutions. Divorce was permitted in England by the 20 and 21 Vict., c. 85, in 1857; and since the middle of this century it has been legalised in many European countries. Divorce Acts have been frequent from early times in almost all the North American Colonies and States. With respect to international jurisprudence on this subject, 'it is deemed by all modern nations to be within the competency of legislation,' says Story, 'to provide for such a dissolution and release in some form, and for some cause. And there is no doubt that a divorce, regularly obtained, according to the jurisprudence of the country where the marriage was celebrated, and where the parties are domiciled, will be held a complete dissolution of the matrimonial contract in every other country. I say, where the marriage is celebrated, and where the parties are domiciled, for both ingredients are, or may be, material, and the presence of one and the absence of the other may change the legal predicament of the case. The real difficulty is to lay down appropriate principles to govern cases where the marriage is celebrated in one place, and the parties are domiciled in another; where there is a change of domicile by one party, without a similar change by the other; where, by the law of the place of celebration, the marriage is indissoluble, or dissoluble only under peculiar circumstances, and by the law of another it is dissoluble for various causes, and even at the pleasure of the parties.' On this subject there is some conflict of authorities, but it is not our intention to examine these discussions.¹

¹ Story, *Conflict of Laws*, §§ 108-230; Kent, *Com. on Amer. Law*, vol. ii. p. 62; Ferguson, *On Marriage and Divorce*, vol. i. § 18; Erskine, *Institutes*, b. i. tit. vi. §§ 38, 43; Wheaton, *Elem. Int. Law*, pt. ii. ch. ii. § 7; *Connelly v. Connelly*, 2 *Law and Eq. R.*, 570; *Dorsey v. Dorsey*,

Laws of
trade and
navi-
gation

§ 12. The laws of trade and navigation of a State are binding upon its citizens wherever they may be, but they cannot affect foreigners beyond its territorial limits. Thus, offences against the laws of a State, regulating or prohibiting any particular trade, if committed by foreigners within the territorial jurisdiction of another State, are not punishable by the tribunals of the State whose laws they have violated ; but if committed by its citizens, they are so punishable, no matter where committed, whether within its own limits, on the high seas, or in a foreign country. A distinction, however, must

1 *Chand.'s Law Reporter*, 287 ; Bowyer, *Universal Public Law*, ch. xvi. ; Gardner, *Institutes*, pp. 201 et seq.

The English Divorce Court will recognise as valid the decree of a Scotch court dissolving the marriage of domiciled Scotch persons, though the marriage was solemnised in England, and the woman was English prior to her marriage. *Semble*.—In some cases the English Divorce Court might recognise as valid the decrees of a foreign Court dissolving the marriages of English persons. (*Harvey v. Farnie*, 5 *L. R.*, Prob. Div., 153 ; and confirmed on appeal.)

Two English persons married in England in 1862. The husband afterwards went to Kansas, in the United States, and after an interval of a year presented a petition, and obtained a divorce by reason of his wife's desertion. He then married again. The wife received no notice of the petition. Held by the Court of Probate in England that his domicile at the time of the divorce was English, and therefore the divorce was void. *Query*.—Whether the domicile of the wife is the domicile of the husband, so as to compel her to become subject to the jurisdiction of the tribunals of any country in which the husband may choose to acquire a domicile. (*Briggs v. Briggs*, *L. R.* 5, Prob. Div., 163.)

After prolonged agitation, the law of July 27, 1884, was passed, by which the remedy of divorce of 1789 was again introduced into France. This law substantially re-enacts the original grounds of divorce, with the exceptions of mutual consent and incompatibility. The grounds upon which an action for divorce is now lawful in France are : (1) Infidelity ; (2) cruelty ; (3) sentence of a criminal court rendering the convicted person infamous, and entailing the loss of civil and political rights.

Prior to this law, the French Courts admitted the right, for a stranger divorced in conformity with the law of his own country, to contract a new marriage in France, even with a French subject, although divorce was not permitted in the latter country. (See Dalloz, *Code Civil Annoté*, art. iii. Nos. 104 et seq., and *Conf. Aubry et Rau, Droit Civil Franç.*, 4 edit., t. i. § 31, p. 98.)

A foreign lady divorced in conformity with the law which forms her personal status cannot contract, in France, a new marriage until ten months after the divorce, even although the law (*personnelle*) permits her to do so earlier (*Cour de Paris*, February 13, 1873, 1^{er} *Chr.*, Gilardin ; 1^{er} *Prés.*, Aubépin, *Att.-Gen.*).

Leibnitz states (pp. 154–56) that the Emperor Lewis of Bavaria claimed in 1341 the sole right of granting dispensations and of judging of the validity of marriages in his empire, and disputed ecclesiastical interference in such matters on the ground that they were merely the subject of human law.

With regard to the ceremony of divorce among the Jews, see 1 *Mann. and Gran.*, 228.

be made between mere commercial regulations permitting or prohibiting a certain trade, and statutes creating a criminal offence, with personal penalties expressly applicable to all the citizens of the State. The commercial domicile of a party may sometimes exempt him from the operation of the laws of trade of his own country, but whilst his former allegiance continues he is liable to incur the penalties of a criminal offence against his own country, which penalties may be enforced whenever he comes within the reach of its municipal laws.¹

§ 13. It is laid down as a general principle of international jurisprudence, that a discharge of a contract by the law of the place where it is made, is a discharge everywhere, no matter whether made between a citizen and a foreigner, or between foreigners. But in the application of this rule it is necessary to distinguish between cases where, by the *lex loci*, there is a virtual or direct extinguishment of the debt itself, and where there is only a partial extinguishment of the remedy. By the *bankrupt* and insolvent laws of some States there is an absolute discharge from all rights and remedies of the creditors, while in other States these laws fall far short of this extent and operation, neither the obligation nor the remedy being entirely extinguished. So far as the bankrupt code merely forms a part of the remedy for a breach of the contract, it belongs to the *lex fori*, which cannot operate extra-territorially within the jurisdiction of any other State having the exclusive right of regulating the proceedings of its own courts of justice. But where the examination, instead of being merely contingent upon the failure to perform the obligation through insolvency, enters into and forms an essential ingredient of the original contract itself, by the law of the country where it is made, it cannot be enforced in any other State by the prohibited means. This has led to various refinements and distinctions in the application of the principles of international jurisprudence to the law of bankruptcy, which it is not our object to discuss.²

¹ Foelix, *Droit Int. Privé*, §§ 510-532; *American Jurist*, vol. xxii. pp. 381-386; Massé, *Droit Commercial*, tom. ii. §§ 38, 376 et seq.; Bello, *Derecho Internacional*, pt. i. cap. iv. §§ 5, 6.

² Lord Stair's *Institutions*, vol. i. p. 4, note, ed. 1832; Rose, *Cases in Bankruptcy*, vol. i. p. 462; Kent, *Com. on Amer. Law*, vol. ii. p. 393; *Harrison v. Sterry*, 5 *Cranch R.*, 289; *Ogden v. Saunders*, 11 *Wheat. R.*, 153; *Sturges v. Crowningshield*, 4 *Wheat. R.*, 122; *Macmillan v. McNeil*, 1 *Wheat. R.*, 209; *Le Roy v. Crowningshield*, 2 *Mason R.*, 161;

Laws of
bank-
ruptcy

Law of
treason
and other
crimes

§ 14 It is a general rule of law that crimes are altogether local, and cognisable and punishable exclusively in the country where they are committed. No other nation, therefore, has any right to punish them, or is under any obligation to take notice of or to enforce any judgment rendered in such cases in the tribunals of another State. Hence, criminal laws may be applied to foreigners and all persons resident within the territory, for all such persons owe a temporary allegiance to the State where they reside. But although a State takes no cognisance of offences committed beyond its limits¹ and against

Pugh v. Russell, 2 *Blackford R.*, 391; *Van Raugh v. Van Arsdale*, 3 *Caine's R.*, 154; *Woodhull v. Wagner*, 1 *Baldwin R.*, 296; *Van Hook v. Whitlock*, 26 *Wendell R.*, 43; *Phillips v. Allen*, 8 *Barn. and Cres. R.*, 477; *Lewis v. Owen*, 4 *Barn. and Ald. R.*, 654; *Le Chevalier v. Lynch*, 1 *Doug. R.*, 170; *Sill v. Worswick*, 1 *H. Blackstone R.*, 665; *Quinn v. Keefe*, 2 *H. Blackstone R.*, 553; *Smith v. Buchanan*, 1 *East R.*, 6; *Potter v. Brown*, 5 *East R.*, 124; *Westlake*, *Private Int. Law*, ch. vii.; *Phillips v. Allen*, 8 *B. and C.*, 477.

¹ But, by the 26 and 27 Vict., c. 35, after reciting that the inhabitants of certain territories in South Africa to the southward of the twenty-fifth degree of south latitude are not within the jurisdiction of any civilised Government, and that crimes and outrages are likely (unless prevented) to be committed within such territories by British subjects, it is provided that the laws which are now or which shall hereafter be in force in the colony of the Cape of Good Hope for the punishment of crimes therein committed, are thereby extended and declared applicable to all British subjects within any territory in Africa, being to the southward of the twenty-fifth degree of south latitude, and not being within the jurisdiction of any civilised Government, and that every crime or offence committed by any British subjects within any such territory shall be cognisable in the courts of the colony of the Cape of Good Hope, or of the colony of Natal, or of any British possessions in Africa to the southward of the said twenty-fifth degree of south latitude. Section 2 empowers the Government of the Cape of Good Hope to address commissions to persons to act as magistrates in such territory. And by Section 4, nothing in the said Act is to invest her Britannic Majesty with any title to sovereignty over such territory.

A British subject having been murdered in 1877 by a native in the island of Tanna, H.M.S. 'Beagle' proceeded thither; the murderer was tried by two naval officers, was found guilty, and executed by hanging at the forearm of the 'Beagle,' the commander being aware that Sir George Innes, Attorney-General for New South Wales, had already given an opinion, based on previous decisions, that there was no jurisdiction in the Colonial courts to try such islanders, they not being British subjects, and the crime not being committed within British territory. The Admiralty deemed that the commander had adopted the most humane course, and approved thereof, but considered it would have been more satisfactory if the execution had taken place on shore, instead of on board ship; that the only real justification for so unusual a mode of punishment lay in the circumstance that the crime committed *was not justiciable by any civilised tribunal*, and was of such a nature as not to admit of any more merciful course being adopted; but that it would be more desirable in any future case that the chiefs of the tribes themselves should, whenever practicable,

the laws of another country, it nevertheless can punish the crimes of its own citizens under its own laws, if within their reach, no matter where the crime may have been committed. Thus, the laws of treason are binding upon the subjects of a State no matter where the treasonable act is done, for their allegiance, until changed, is considered as travelling with them wherever they may go.¹

§ 15. It may be stated, in general terms, that the judicial power of a State is coextensive with its legislative power, and is independent of every other State. The general position, however, must be qualified by the exceptions to its application arising out of express compacts with others, by which it may part with certain portions of its sovereign rights or modify the exercise of its powers as a sovereign and independent State.² It must be noticed also that its judicial power does not embrace those cases in which the municipal claims of another nation operate within its territory, such as the cases of foreign ministers, or of a fleet or army coming within its territorial limits, by its permission, either express or implied. It has already been stated that the maritime territory of every State extends to the ports, harbours, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands belonging to the same State, and that the general usage of nations has superadded the extent of one marine league, or what was

Judicial
power of
a State

inflict the punishment on the native. The Attorney-General in the House of Commons supported the action of the naval officers ; not that they or any other Englishman had any jurisdiction to try the native, but because when a savage attacks a British subject, and when it is necessary for securing the rights of British subjects to levy war on savages, England was perfectly justified in so doing.

A foreign ship cannot set up against a British vessel with which she has been in collision the British vessel's violation of British Statute Law on the high seas, for the foreigner could not herself be bound by it, as it is beyond the power of the legislature to make rules applicable to foreign vessels beyond British waters. (The 'Zollverein,' *Swab. Admir. Rep.*, p. 96, 1856).

See further, as to jurisdiction exercised abroad by Great Britain, the Foreign Jurisdiction Act (1890), and the Orders in Council made under them, relating to China, Japan, Corea, Cyprus, Ottoman dominions, Siam, South Africa, West Africa, and Zanzibar ; also 17 and 18 Vict., c. 104, sect. 267 ; and 24 and 25 Vict., c. 100, sects. 9, 57.

Great Britain exercises a protectorate over the State of Sarawak, the Sultanate of Brunei, and the possession of the North Borneo Company ; also on the Niger through the National African Company.

¹ Massé, *Droit Comm.*, t. ii. §§ 39 et seq. ; *American Jurist*, vol. xxii. pp. 381-386 ; Foelix, *Droit Int. Privé*, 510-532.

² See ch. xi. § 21.

formerly the range of a cannon shot, along all its shores or coasts. Within these limits its right of territorial jurisdiction is absolute, and excludes that of every other nation.¹ Beyond these limits it may also exercise jurisdiction for certain special purposes, as the execution and enforcement of its revenue laws, &c., and over its own public and private vessels on the high seas, and its public, and to a certain extent its private, vessels in foreign ports.²

Juris-
diction
with
respect to
actions

§ 16. Continental jurists generally agree that, properly speaking, there are three places of jurisdiction : first, the *forum domicilii* or place of domicile of the party defendant ; second, the *forum rei sitæ*, or the place where the thing in controversy is situate ; and third, the *forum contractûs*, or *forum rei gestæ*, or the place where the contract is made or the act is done. These distinctions in jurisdiction result from the distinctions of the Roman civil law which have been introduced into the jurisprudence of most of the continental nations of modern Europe. Considered in an international point of view, either the thing or the person made the subject of the jurisdiction must be within the territory, for no sovereignty can extend its process beyond its own territorial limits so as to subject either persons or property to its judicial decisions ; and every exertion of authority of this sort, beyond its limits, is a mere nullity, and incapable of binding such persons or property in any other tribunals.³

Of a State
over its
own
citizens

§ 17. In regard to the citizens (native or naturalised) of a State, while within its territory, the jurisdiction of the sove-

¹ This must be read subject to the qualifications expressed in ch. vi. § 13.

² Webster, *Dip. and Off. Papers*, pp. 140 et seq. ; 'Le Louis,' 2 *Dod. R.*, 245 ; Church *v.* Hubbard, 2 *Cranch R.*, 234 ; and see notes to ch. vi. § 13.

³ Story, *Conflict of Laws*, §§ 537, 538 ; Henry, *Foreign Law*, ch. viii. p. 54 ; ch. ix. p. 63 ; Pardessus, *Droit Com.*, tom. v. § 1353 ; Boullenois, *Traité des Lois*, tom. i. pp. 601-635 ; Blackstone, *Commentaries*, vol. iii. pp. 117, 118, 294 ; Bowyer, *Universal Public Law*, ch. xvi. ; Westlake, *Private Int. Law*, chs. v. vi. ; Riquelme, *Derecho Púb. Int.*, lib. ii. tit. i. cap. iii. ; the 'M. Moxham,' 1 *L. R.*, P. D., 109 ; Mostyn *v.* Fabrigas, *Cowp.*, 168 ; Doullson *v.* Matthews, 4 *T. R.*, 503. In Great Britain, by the Rules of the Supreme Court, 1883, a writ may be served upon a British subject residing abroad, and notice of a writ having been issued in England against a foreigner may be served upon a foreigner abroad. But the leave to serve such writ or notice abroad is in the discretion of the Court. See, as to this, *Société, &c. v. Dreyfus*, 37 *C. D.*, 215 ; *Great Australian Company v. Martin*, 25 *W. R.*, 246 ; and *Lenders v. Anderson*, 12 *Q. B. D.*, 56.

reignty over them is complete and irresistible. It cannot be controlled, and ought everywhere to be respected. In regard to citizens domiciled abroad, nations generally assert a claim to regulate the rights, duties, acts, and obligations of their own citizens wherever they may be domiciled. 'And so far,' says Story, 'as these rights, duties, obligations, and acts afterward come under the cognisance of the tribunals of the sovereign power of their own country, either for enforcement, or for protection, or for remedy, there may be no just ground to exclude this claim. But where such rights, duties, obligations, and acts come under the consideration of other countries, and especially of the country where such citizens are domiciled, the duty of recognising and enforcing such claim of sovereignty is neither clear nor generally admitted. The most that can be said is, that it may be admitted *ex comitate gentium*; but it may also be denied *ex justitiâ gentium*, wherever it is deemed to be injurious to the interests of foreign nations, or subversive of their policy or institutions. No one, for instance, could imagine that a judgment of the parent country confiscating the property or extinguishing the personal rights or capacities of a native on account of such foreign residence, would be recognised in any other country. And it would be as little expected, as a matter of right, that any other country would enforce a judgment against such person in the parent country, obtained *in invitum*, on account of a supposed contumacy in remaining abroad, to which he had never appeared, and of which he had received no notice, however, it might be in conformity to the local laws.'

§ 18. The same distinguished writer says that it is clear, ^{Over alien residents} upon general principles of international law, that a nation has a right of jurisdiction over foreigners resident in the country, and the extent to which such jurisdiction shall be exercised is a matter purely of municipal arrangement and policy. All persons found within the limits of a Government (unless specially excepted by the law of nations), whether their residence is permanent or temporary, are subject to its jurisdiction; but it may, or may not, as it chooses, exercise it in cases of dispute between foreigners. Thus, in France, with few exceptions, the tribunals do not entertain jurisdiction of controversies between foreigners respecting personal rights and interest. But this is a matter of mere municipal policy and convenience,

and does not result from any principles of international law. In England and America, on the other hand, suits are maintainable, and are constantly maintained, between foreigners, where either of them is within the territory of the State where the suit is brought. But, though every nation may thus rightfully exercise jurisdiction over all persons within its domains, yet we are to understand that, in regard to suits, the doctrine applies to suits purely personal, or connected with property within the same sovereignty. For, although the person may be within the jurisdiction, yet it is by no means true that, in virtue thereof, every sort of suit may be maintainable against him. A suit cannot, for instance, be maintainable against him, so as to absolutely bind property situate elsewhere, and, *a fortiori*, not absolutely to bind the rights and titles to immovable property.¹

Over real
property

§ 19. The jurisdiction of a State over all real property within its territory results as a necessary consequence of the rule relating to the application of the *lex loci rei sitæ*. As everything relating to the tenure, title, transfer, descent, and testamentary disposition of real property is regulated by the local law, so, also, all proceedings in courts of justice relating to that species of property, such as the rules of evidence, the forms of action and pleadings, and rules of decision, must necessarily be governed by the same law. This jurisdiction is exclusive. 'In respect to immovable property,' says Story, 'every attempt of a foreign tribunal to found a jurisdiction over it must, from the very nature of the case, be utterly nugatory, and its decree must be for ever incapable of execution *in rem*. It is true that property within a country does not make the owner generally a subject of the sovereign where it is locally situate, but it subjects him to his jurisdiction *secundum quid, et aliquo modo*. Mixed actions, so far as they regard the realty, are to be brought in the place *rei sitæ*, but if the personal damages or claims be separable in their nature and character, they may be sued for as personal actions.' The rule of common law is, that personal actions may be brought in any place where the party defendant can be found; that real actions must be brought in the *forum rei*

¹ Story, *Conflict of Laws*, §§ 541-544; Vattel, *Droit des Gens*, liv. i. ch. xix. § 213; liv. ii. ch. viii. §§ 99-103; Massé, *Droit Commercial*, tom. ii. §§ 164 et seq.

sita, and that mixed actions, which are deemed local, are properly referrible to the same tribunals.¹

§ 20. With respect to jurisdiction over personal property, Story says, the general doctrine is not controverted, that though movables are, for many purposes, to be deemed to have no *situs*, except that of the domicile of the owner,² yet, this having but a legal fiction, it yields whenever it is necessary, for the purpose of justice, that the actual *situs* of the thing should be examined. The State in whose territory personal property is actually situate has an entire dominion, sovereignty and jurisdiction over it while there, as it has over real property, and it may, to the same extent, regulate its transfer, subject it to process and execution, and control its uses and disposition. Hence it is that, whenever personal property is taken by arrest, attachment, or execution within a State, the title so acquired under the laws of the State is held valid in every other State; and the same rule is applied to debts due to non-residents, which are subjected to the like process under the local laws of the State.³

§ 21. Mr. Wheaton considers the rule, with respect to the jurisdiction of a State over personal property or movables within its territorial limits, to be the same as over immovables or real property, with this qualification: that foreign laws may furnish the rule of decision in cases where they apply, whilst the forms of process, rules of evidence and prescription are governed by the *lex fori*. 'Thus,' he says, 'the *lex domicilii* forms the law in respect to a testament of personal property, or succession *ab intestato*, if the will is made, or the

¹ Story, *Conflict of Laws*, §§ 551-555; Huberus, *Prælectiones*, lib. i. tit. iii. § 15; Livingston v. Jefferson, 4 *Hall's Amer. Law Jour.*, p. 78. But English Courts have made decrees concerning foreign real property in a collateral manner—i.e. *in personam*—where the defendant has happened to be within British jurisdiction. This authority is exercised very sparingly; there must be some contract or equity to be enforced, and some special reason to call for its enforcement—such as the domicile of the defendant, the place of the contract, or of the subject matter. (*Pen. v. Baltimore*, 1 *Ves. Sen.*, 444; *Paget v. Ede*, *L. R.*, 18 Eq. 118; *Norris v. Chambers*, 30 *L. J.*, c. 285; *Cookney v. Anderson*, 31 *Beav.*, 452; *Abbott v. Abbott*, 6 *L. R.*, P. C., 220; *Harrison v. Harrison*, *L. R.*, 8 Ch., 342.)

² *Re Ewin*, 1 *C. and J.*, 156; *Potter v. Brown*, 5 *East*, 130; *Countess D'Acunha's Case*, 1 *Hagg. Eccles. Cas.*, 237.

³ Story, *Conflict of Laws*, § 550; *Ogden v. Falliot*, 3 *Term. R.*, 733; *Bissell v. Briggs*, 9 *Mass. R.*, 462-469; and, in England, *Hart v. Herwig*, *L. R.*, 8 Ch., 860; *Van Grutten v. Digby*, 31 *Beav.*, 561; 36 and 37 Vict., cc. 66 and 38, and 39 Vict., c. 77; order xi. rule 1 of Rules of 1883.

party on whom the succession devolves resides, in a foreign country ; whilst, at the same time, the *lex fori* of the State in whose tribunals the suit is pending, determines the forms of process and prescription. Though the distribution of the personal effects of an intestate is to be made according to the law of the place where the deceased was domiciled, it does not, therefore, follow that the distribution is, in all cases, to be made by the tribunals of that place, to the exclusion of those of the country where the property is situate. Whether the tribunal of the State where the property lies is to decree distribution, or to remit the property abroad, is a matter of judicial discretion, to be exercised according to the circumstances. It is the duty of every Government to protect its own citizens in the recovery of their debts, and other just claims : and in the case of a solvent estate, it would be an unreasonable and useless comity to send the funds abroad, and the resident creditor after them. But if the estate be insolvent, it ought not to be sequestered for the exclusive benefit of the subjects of the State where it lies. In all civilised countries, foreigners, in such cases, are entitled to prove their debts and share in the distribution. Though the forms in which a testament of personal property, made in a foreign country, is to be executed, are regulated by the local law, such a testament cannot be carried into effect in the State where the property lies, until, in the language of the law of England, *probate* has been obtained in the proper tribunal of such State, or, in the language of the civilians, it has been *homologated*, or registered in such tribunal. So, also, a foreign executor, constituted such by the will of the testator, cannot exercise his authority in another State, without taking out letters of administration in the proper local court. Nor can the administrator of a succession *ab intestato*, appointed *ex officio* under the laws of a foreign State, interfere with the personal property in another State belonging to the succession, without having his authority confirmed by the local tribunal.' ¹

Origin of
the differ-
ence

§ 22. It may be proper to allude, in this place, to the principle which lies at the foundation of the distinctions which have been made by the courts of different countries in the

¹ Wheaton, *Elem. Int. Law*, pt. ii. ch. ii. § 17 ; *Armstrong v. Lear*, 12 *Wheat. R.*, 169.

rule of international comity, as applied to contracts *inter vivos* and dispositions *mortis causâ*, and as applied to foreign bankrupt laws, and to foreign voluntary assignments for the benefit of creditors. The *jus disponendi*, or right to dispose of property by contracts *inter vivos*, has its origin in the law of nature, and is not the offspring of legislation. And where there is no statutory provision prohibiting or regulating the disposition of property by a particular kind of contract, such a disposition will be considered good and valid.¹ By the Roman law, the power to make a testament belonged peculiarly and exclusively to citizens. So provides the Falcidian law. A foreigner, therefore, could not use this power. The decemviral law had granted it to the fathers of families, whom it invested, by this act, with the character of legislators, which would have been degraded if exercised by any other than Roman citizens. In some States, the treasury appropriated the property of foreigners who died there; hence arose their inability to make a testament; but this barbarous law no longer forms part of any legislation. The French law, according to Pothier, adopted the maxim of the Roman law, *factio testamenti est juris civilis*. For that reason, a foreigner could not dispose of property by testament. He was forbidden by municipal law. But, says Pothier, the right to dispose of property by acts *inter vivos* is founded on the *jus gentium*, the law of nature. And, in truth, it cannot be otherwise. *Dominium*, or the right over things which are ours, consists, according to all writers who have defined it, of two parts—first, the right to dispose of the thing,

¹ On this point, Pothier, in his *Traité des Personnes*, in discussing the laws of France, thus describes the origin and character of this class of contracts: 'Although foreigners may make all sorts of contracts *inter vivos*; although they may, in this manner, dispose of property which they may acquire in France, either by titles onerous or gratuitous, they cannot dispose of property which they own in France, either by testament, or by any other act *causâ mortis*, in favour of foreigners or citizens; neither can foreigners take anything by testament, or by any other act *causâ mortis*, although they are capable of donations *inter vivos*. This difference, which the law establishes between acts *inter vivos* and acts *causâ mortis*, in permitting foreigners to do the former and prohibiting them from doing the latter, is founded on the very nature of these acts. Acts *inter vivos* are founded on the *droit des gens* (*jus gentium*—or law of nature). Foreigners enjoy every right which arises from the *jus gentium*. They may, therefore, perform all sorts of acts *inter vivos*. The right to make a testament, active or passive, is, on the contrary, derived from the civil law—*testamenti factio est juris civilis*—foreigners not enjoying what is of civil law, have not this faculty or right.' (Pothier, *Traité des Personnes*, pt. i. tit. ii. § 2.)

and secondly, the right to enjoy it exclusively. When either part is wanting, the *dominium* is mutilated. The right to acquire property is the right to hold this *dominium* over things, and no man can be said to have full property in a thing who has not the right to dispose of it and to enjoy it exclusively. The *jus disponendi* exists, then, necessarily, where there is the full right of property.¹

Voluntary
assign-
ments and
assign-
ments in
bank-
ruptcy

§ 23. From the same principle results the distinction which is generally made by the Courts of the United States between a foreign voluntary assignment for the benefit of creditors, and a foreign assignment in bankruptcy. The *jus disponendi* applies to the former, whereas an assignment under the bankrupt law is a proceeding *in invitum*; the one is a universal natural right applicable everywhere, while the other is a forcible disposition, having its origin in local law, and confined to the jurisdictional limits of the maker of the law. Story says: 'There is a marked distinction between a voluntary conveyance by the owner, and a conveyance by mere operation of law in cases of bankruptcy *in invitum*. Laws cannot force the will, nor compel any man to make a conveyance. In place of a voluntary conveyance of the owner, all that the legislature of a country can do, when justice requires it, is to assume the disposition of his property *in invitum*. But a statutable conveyance, made under the authority of any legislature, cannot operate upon any property except that which is within its own territory. This makes a solid distinction between a voluntary conveyance of the owner and an involuntary conveyance by the mere authority of the law. The former has no relation to place, the latter, on the contrary, has the strictest relation to place. The distinction is insisted on with great force by Lord Kames. It is, therefore, admitted, that a voluntary assignment by a party, according to the law of the domicile, will pass his personal estate, *whatever may be its locality abroad, as well as at home*. But it by no means follows that the same rule should govern in cases of assignments by operation of law.'²

The Courts of Great Britain apply the rule of comity

¹ *Sala Mexicana*, tom. ii. pp. 109, 110; Riquelme, *Derecho Púb. Int.*, lib. ii. tit. i. caps. i.-iv.

² Story, *Conflict of Laws*, §§ 408-411 (third edition); Kames, *On Equity*, b. iii. ch. viii. § 6 (Edinburgh, 1800); Kent, *Com. on Amer. Law*, vol. ii. pp. 404-408; *Forbes v. Scannel*, 13 *Cal. R.*, 242.

generally to the laws of bankruptcy as well as to voluntary assignments.¹

§ 24. Public and private vessels on the high seas and out of the territorial limits of any other State, are subject to the jurisdiction of the State to which they belong. The ocean is common to all mankind, and may be successively used by all as they have occasion. According to Vattel, the domain of a nation extends to all its just possessions, not merely possessions of territory, but also of rights it is entitled to enjoy. It has the right to navigate the ocean, which is the territory of no one, and its jurisdiction over its vessels so employed on the high seas results from this right (*droit*) rather than from the jurisdiction which it is entitled to exercise over the persons who compose its fleets or man its private vessels. But this jurisdiction is exclusive only so far as respects offences against its own municipal laws, and not as respects offences against the law of nations—such as piracy²—which may be punished in the competent tribunal of any country where the offender may be found, or into which he may be carried, although committed on board a foreign vessel on the high seas. But this jurisdiction of the courts of one nation over international offences committed on board the vessels of another on the high seas, when such vessels are brought within its territorial limits, does not extend to the right of visitation and search for the purpose of obtaining the custody of the offenders, in time of peace, unless expressly permitted by international compact. The right of search for contraband and enemy's goods, in time of war, results from the rights of war, and rests upon principles essentially different, as will be hereafter shown.³

§ 25. Where there are no express prohibitions, the ports of one State are considered as open to the public armed and

Public and private vessels on the high seas

Public vessels and prizes in foreign ports

¹ *Selkirk v. Davis*, 2 *Dow.*, 245; *Benfield v. Solomon*, 9 *Ves.*, 77; *Cockerell v. Dickens*, 3 *Moo.*, P. C., 98; but, on the other hand, see 32 and 33 *Vict.*, c. 71, sect. 19.

² To which Vattel adds 'poisoners, assassins, and incendiaries by profession' (lib. i. ch. xix. § 233).

³ See ch. xxvii.; Vattel, *Droit des Gens*, liv. i. ch. xix. § 216; liv. ii. ch. vii. § 80; Grotius, *De Jure Bel. ac Pac.*, lib. ii. cap. iii. § 13; Rutherford, *Institutes*, b. ii. ch. ix. §§ 8, 9; the 'Louis,' 2 *Dods. R.*, 238; the 'Antelope,' 10 *Wheat. R.*, 122; the 'Marianna Flora,' 11 *Wheat. R.*, 39; Cushing, *Opinions of U.S. Attys.-Genl.*, vol. viii. pp. 73 et seq.; Riquelme, *Derecho Púb. Int.*, lib. i. pt. ii. cap. ix.; 'The Constitution,' 48 *L. J.* (N. S.), P., D. and A., 13; 'The Sitka,' *Opinions of U. S. Atty-Genl.*, vii. 122.

commissioned vessels of every other nation with whom it is at peace. Such ships are exempt from the jurisdiction of the local tribunals and authorities, whether they enter the ports under an express permission, stipulated by treaty, or a permission implied from the absence of prohibition.¹ This exemption, which is termed 'extra-territoriality,' extends not only to the belligerent ships of war, privateers, and the prizes of either, who seek a temporary refuge in neutral waters from the casualties of the sea and war, but also to prisoners of war on board any prize or public vessel of her captor. Such vessels, in the command of a public officer, possess, in the ports of a neutral, the rights of extra-territoriality, and are not subject to the local jurisdiction. But whatever may be the nature and extent of the exemption of the public or private vessels of one State, from the local jurisdiction in the ports of another, it is evident that this exemption, whether express or implied, can never be construed to justify acts of hostility committed by such vessel, her officers and crew, in violation of the law of nations against the security of the State in whose ports she is received, or to exclude the local tribunals and authorities from resorting to such measures of self-defence as the security of the State may require.² There-

¹ A foreign ship of war, or any other prize of hers in command of a public officer, possesses in the ports of the United States the right of exterritoriality, and is not subject to the local jurisdiction. (7 *Opin. Atty.-Genl.*, 122.)

² Wheaton, *Elem. Int. Law*, pt. ii. ch. ii. §§ 95, 104.

The following are cases in which the local jurisdiction prevails over a foreign ship of war :—

(1) *Neutrality*.—The right and duty of a neutral State to enforce neutrality within its waters are universally admitted ; and since the case of the 'Alabama' the necessity of due diligence in performing this duty has become very apparent. This duty involves imposing certain restrictions on the belligerent cruisers, and in some circumstances subjecting their officers and men to criminal responsibilities.

(2) *Prize*.—If a foreign ship of war brings illegal prize (prize taken in violation of neutrality, &c.) into a neutral port, such prize may be arrested and restored to its proper owner by the Admiralty Court. (See *post.* decision in the case of the 'Santissima Trinidad ;' also British and Foreign Enlistment Act, 33 and 34 Vict., cap. 90, sect. 14.)

(3) *Foreign Enlistment Act*.—Officers of foreign ships of war appear to be liable to British tribunals for breaches of the British Foreign Enlistment Act, and punishable by fine and imprisonment. (See sections 6, 7, 11, 24.)

(4) *Smuggling*.—Foreign ships of war are not permitted to pursue or capture smugglers in territorial waters, and, if need arises, are prevented doing so by force. The territorial authority is thus constantly maintained with more or less display of force by the fortress of Gibraltar against Spanish *guardacostas*.

fore a public vessel would not hesitate to give up to the local authorities a person accused of a serious crime who might have come on board her ; and it is probable that she might even do so in the case of a person evading conscription.

(5) *Quarantine*.—Foreign ships of war are bound to observe the local laws of quarantine (see ch. xiii. § 23).

(6) Foreign ships of war are liable to the Customs laws, to be searched by the Customs officers, who may remove goods, &c. (39 and 40 Vict., cap. 36, sect. 52, Customs Consolidation Act, 1876.)

(7) *Anchorage*.—Commanders of foreign ships of war are bound to comply with the regulations of the port as to anchoring, taking in and discharging powder, avoiding collisions, &c.

(8) *Salvage, &c.*—In the case of salvage, collision, &c., whether occurring within or without the territorial jurisdiction, where the law of the place or the law maritime, as there recognised, gives a right of lien or arrest by warrant of the Admiralty Court for such claims, it is a moot question whether foreign ships of war are liable to be so arrested. The case of the ‘Exchange,’ before mentioned, though not precisely in point, indicates that such arrest would not be permitted by the American tribunals. And in the case of the ‘Charkieh’ (8 *Law. R.*, Q. B. 200), where the precise question was raised, but not decided, Mr. Justice Blackburn observed : ‘There is authority for saying that courts of justice cannot proceed against a sovereign or a State, and I think there is also authority for saying they ought not to proceed against ships of war or national vessels ; and it is obviously desirable that this rule should be established ; otherwise wars might be brought on between two countries.’ On the other hand, Sir Robert Phillimore (4 *L. R.*, Adm., 93) said : ‘It is, however, by no means clear that a ship of war to which salvage services have been rendered may not, *jure gentium*, be liable to be proceeded against in a Court of Admiralty for remuneration due to such services. It is very remarkable that Lord Stowell declined to pronounce any opinion upon this point in the case of “The Prins Frederick” (2 *Dods.*, 451), though it appears that he had, upon principles of English law, previously declined to entertain a suit of this kind attempted to be instituted by a British subject against a British man-of-war ; “The Comus” (referred to *ibid.* 454). . . . I am disposed to hold that within the ebb and flow of the sea in the case of salvage, the *obligatio ex quasi contractu* attaches *jure gentium* upon the ship to which the service has been rendered, and in the case of collision the *obligatio ex quasi delicto* attaches *jure gentium* upon the ship which is the wrong-doer, whatever be her character, public or private ; and such, I think, was the inclination of Lord Stowell’s mind in the case of “The Prins Frederick,” and in the case of the “Swift” (1 *Dods.*, 320).’

(9) *Arrest on Shore*.—The right of municipal authorities to arrest on shore and punish officers or men belonging to foreign ships of war, for acts committed on shore, is universally admitted and not seldom acted upon, although it is obvious that the exercise of this jurisdiction might seriously affect the efficiency of the ship of war in question. And Kent (*Law of Nations*, Abdy’s edit., 396) says :—‘It has also been asserted, on the part of the executive authority of the United States, that a writ of *habeas corpus* may be lawfully awarded to bring up a subject illegally detained on board of a foreign ship of war in their waters. So also it was the official opinion of the Attorney-General of the United States, in 1799, that it was lawful to serve civil or criminal process upon a person on board a foreign ship of war lying within a harbour of the United States.’

If prisoners of war be taken on shore, in a neutral port, they become subject to the local jurisdiction, or not, according as it may be agreed between the political authorities of the belligerent and the neutral Powers. Foreign troops stationed in, or passing through, the territory of another State, with whom the foreign State is in amity, are undoubtedly exempt from the civil and criminal jurisdiction of the place. But this right of passage is derived from an express and not an implied permission, which may be given with specified limitations.¹

The theory that a ship of war is a continuation of the country to which she belongs,² is extra-territorial, and as such is entitled to absolute immunity from foreign law, has been praised by some writers; but it is submitted that 'extra-territoriality' is obviously a fiction, and that it belongs to the well-known class of legal fictions, to the imaginary class of absolute rights, which played an important part in their day, but which, when confronted by facts, had to be qualified by exceptions and distinctions until at last limited and relative doctrines have been substituted for them. Useful, no doubt, the fiction once was in founding a claim for some exemption before the general international status of European States was matured, and no certain custom could be appealed to; but now it serves only the purpose of begging the question that the ship of war is exempt from the foreign law, the argument being of this kind: Why is the ship exempt from this foreign jurisdiction? Because it is extra-territorial. Why is it extra-territorial? Because it is exempt from all foreign jurisdiction. The fiction of extra-territoriality characteristically denies the essential fact that the ship in the foreign port

¹ Kent, *Com. on Amer. Law*, vol. i. p. 157, note; Cushing, *Opinions of U. S. Attys.-Genl.*, vol. vii. p. 123; Foelix, *Droit International Privé*, § 164; Ortolan, *Diplomatie de la Mer*, liv. ii. ch. xiii.; the 'Exchange,' 7 *Cranch R.*, 135; Phillimore, *On Int. Law*, vol. i. § 341; Hautefeuille, *Des Nations Neutres*, tom. i. pp. 475, 476; the 'Betsey,' 3 *Dall. R.*, 6; the 'Cassius,' 3 *Dall. R.*, 121; the 'Alerto,' 9 *Cranch R.*, 359; and see vol. ii. ch. xxiv. §§ 5 et seq.

² By the Marriage Act, 1890 (53 and 54 Vict., c. 47), every marriage between parties, of whom one at least is a British subject, which, after January 1, 1891, is solemnised in accordance with the provisions of this Act, on board a British ship of war on a foreign station, shall be as valid as if the same had been solemnised within the United Kingdom; and, by 54 and 55 Vict., c. 74, certain marriages solemnised on or before July 31, 1891, on ships of war are confirmed.

is within the territorial ambit of another State. It totally ignores the existence of that other State, its inhabitants, its Government, its laws, its interests, its powers, its rights, its duties ; indeed, it may be said to ignore all foreign States whatsoever. It ignores the relation of State to State, which is the very thing to be considered. The truth is that jurists habitually resorted to fictions of this nature when they wanted authority for the propositions they desired to lay down. In the facts they saw reasons of convenience or utility, but these they deemed insufficient authority. They therefore created—presumed—a contract of a more general character, which seemed to them to furnish the necessary sanctions. Invalid as their general theory was, their conclusions were, of course, often most valuable, and such as later times have more or less fully accepted.

In the case of the 'Exchange,' determined in the supreme courts of the United States, the purpose was to pronounce exemption from local jurisdiction. The decision proceeded, not on the fiction of extra-territoriality, but on that of an 'implied licence.' This vessel had originally belonged to an American citizen, but had been seized and confiscated at St. Sebastian, in Spain, and converted into a public armed vessel by the Emperor Napoleon in 1810, and was reclaimed by the original owner on her arrival in the port of Philadelphia. When the case was argued, Pinckney, who was counsel for the 'Exchange,' disparaged book-authorities, and put his case thus : 'We are asked, whence we infer the immunity of the public armed vessel of a sovereign ? We answer, From the nature of sovereignty, and the universal practice of nations from the time of Tyre and Sidon.'

Chief Justice Marshall rendered the following important judgment : 'The jurisdiction of courts of justice is a branch of that possessed by the nation as an independent sovereign Power. The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of its restriction, and an investment of that sovereignty, to the same extent, in that power which could impose that restriction. All exceptions, therefore, to the full and complete power of a nation,

within its own territories, must be traced up to the consent of the nation itself. They could flow from no other legitimate source. This consent might be either express or implied. In the latter case it is less determinate, exposed more to the uncertainties of construction, but, if understood, not less obligatory. The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. This consent might, in some instances, be tested by common usage, and by common opinion growing out of that usage. A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly, and without previous notice, exercise its territorial jurisdiction in a manner not consonant to the usages and received obligations of the civilised world. This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, has given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete, exclusive territorial jurisdiction which has been stated to be the attribute of every nation. One of these is the exemption of the person of the sovereign from arrest or detention within a foreign territory.¹ A second case, standing on the same

¹ A sovereign prince is exempt from the jurisdiction of the tribunals of the State in which he happens to be, absolutely so far as his person is concerned, and with respect to his property at least so far as that is connected with the dignity of his position and the exercise of his public functions. No proceedings *in rem* can be instituted against the property of a sovereign prince if the *res* can, in any fair sense, be said to be connected with the *jus coronæ* of the sovereign; but other property of a sovereign may be proceeded against *in rem*.

The Khedive of Egypt is not a sovereign prince, and is therefore not entitled to claim the exemption, for himself and his property, from the ordinary process of the courts of Great Britain, which is by international law founded upon the comity of nations accorded to foreign sovereigns. (The 'Charkieh,' *Aspinall's Mar. L. C.*, 581.)

It was held by the English Court of Appeal, in 1880 (reversing the decision of the Admiralty Division), that an unarmed packet belonging to the sovereign of a foreign State, and in the hands of officers commissioned by him, and employed in carrying mails, is not liable to be seized in a suit *in rem* to recover redress for a collision; that this immunity is

principle with the first, is the immunity which all civilised nations allow to foreign ministers. Whatever may be the principle on which this immunity might be established, whether we consider the minister as in the place of the sovereign he represents, or by a political fiction suppose him to be extra-territorial, and therefore in point of law not within the jurisdiction of the sovereign at whose court he resides, still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of extra-territoriality could not be erected and supported against the will of the sovereign of the territory ; he is supposed to assent to it. A third case, in which a sovereign is understood to cede a portion of his territorial jurisdiction, is where he allows the troops of a foreign prince to pass through his dominions. In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted,

not lost by reason of the packet also carrying merchandise and passengers for hire ; and that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence of every other sovereign State, each State declines to exercise by means of any of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador, or over the public property of any State which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory. (The 'Parlement Belge,' *L. R.*, 5 Prob. Div., 197.) It is to be noted that this decision appears to have been based, not on the fact that the vessel was a *quasi* ship of war, but on the fact that she was the property of a sovereign. It is therefore submitted that this decision does not grant to such vessels immunities recognised as appertaining to ships of war—such, for instance, as immunity from search. And it is difficult to reconcile the decision with the provisions of 17 and 18 Vict., c. 104, sect. 213, which enact that 'if any subject of her Majesty, after having been engaged by any person to serve *in any ship belonging to any foreign Power*, or to the subject of any foreign Power, becomes distressed and is relieved as aforesaid, the wages . . . and all expenses *shall be a charge upon the ship* . . . and the Board of Trade may in the name of her Majesty sue for and recover the said wages and expenses.' Query if 'ship' includes a ship of war. 'Ship,' in the interpretation of the Act, 'shall include every description of vessel used in navigation not propelled by oars.'

A vessel of war commissioned by the Government of the United States and engaged in the national service of that Government was stranded on the coast of England. She had a cargo of machinery on board her, alleged to belong to private individuals, of which her Government had for public purposes charged itself with the care and protection. Salvage services were rendered to the ship and cargo. A suit was instituted on behalf of certain of the salvors against the ship and cargo. The Court of Admiralty (in 1879) refused to order a warrant to issue for the arrest of the ship and cargo, and held it had no jurisdiction to entertain the suit. (The 'Constitution,' *L. R.*, 4 Prob. Div., 39.)

the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require. . . . If the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly Powers, the conclusion seems irresistible that they enter by his assent ; and if they enter by his assent necessarily implied, no just reason is perceived for distinguishing their case from that of vessels which enter by express assent. The whole reasoning upon which such exemption has been implied, in the case of a sovereign or his minister, applies with full force to the exemption of ships of war in the case in question. It is impossible to conceive, said Vattel, that a prince who sends an ambassador, or any other minister, can have any intention of subjecting him to the authority of a foreign Power. . . . Equally impossible was it to conceive that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this could not be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked. . . . A clear distinction is to be drawn between the rights accorded to private individuals, or private trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation. . . . The situation of a public armed ship is in all respects essentially different ; she constitutes a part of the military force of her nation, acts under the immediate and direct command of the sovereign, is employed by him on national objects ; he has many and powerful motives for preventing those objects from being defeated by

the interference of a foreign State ; such interference cannot take place without seriously affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port may reasonably be construed, and it seems to the Court should be construed, as containing an exemption from the jurisdiction of the sovereign within whose territory she claims the rights of hospitality. Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place ; but certainly in practice nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception. . . . Without doubt the sovereign of the place is capable of destroying this implication (that the ship of war is exempt from his jurisdiction). He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals ; but until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction which it would be a breach of faith to exercise. Those general statutory provisions, therefore, which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him a right to claim that property in the courts of the country in which it is found, ought not, in the opinion of the Court, to be so construed as to give them jurisdiction in a case in which the sovereign power had implicitly consented to waive its jurisdiction. The Court has come to the conclusion that the vessel in question, being a public armed ship, in the service of a foreign sovereign with whom the United States were at peace, and having entered an American port open for her reception on the terms on which ships of war are generally permitted to enter the ports of a foreign Power, must be considered as having come into the American territory under an implied promise that, while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.’¹

Again, the ‘*Independencia*,’ a cruiser, in breach of the laws of neutrality, increased her armament at Baltimore, in October, 1816. She left Baltimore in December, 1816, and the capes of the Chesapeake February 8, 1817, and

¹ The ‘*Exchange*,’ 7 *Cranch*, 135.

shortly afterwards captured the 'Santissima Trinidad.' In March, 1817, she came into Norfolk, and part of the cargo taken from the 'Santissima Trinidad' was, with the approbation and consent of the Government of the United States, landed for safe-keeping in the Custom-House store. The owners of the cargo then took proceedings to recover possession.

In this case Mr. Justice Story observes :—' In the case of the "Exchange" the grounds of the exemption of public ships were fully discussed and expounded. It was shown that it was not founded upon any notion that a foreign sovereign had an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign, when it came within his territory, for that would be to give him sovereign power beyond the limits of his own empire. But it stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations, that foreign public ships coming into their ports and demeaning themselves according to law, and in a friendly manner, shall be exempt from the local jurisdiction ; but as such consent and license is implied only from the general usage of nations, it may be withdrawn upon notice at any time without just offence ; and if, afterwards, such public ships come into our ports they are amenable to our laws in the same manner as other vessels. . . . It may therefore be justly laid down as a general proposition, that all persons and property within the territorial jurisdiction of a sovereign are amenable to the jurisdiction of himself or his courts, and that the exceptions to this rule are such only as by common usage and public policy have been allowed, in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights. It would indeed be strange if a licence implied by law from the general practice of nations for the purposes of peace should be construed as a licence to do wrong to the nation itself, and justify the breach of all those obligations which good faith and friendship by the same implication impose upon those who seek an asylum in our ports. . . . We are of opinion that whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of

our courts for the purpose of examination and inquiry, and, if a proper case be made out, for restitution to those whose possession has been defrauded by a violation of our neutrality.' ¹

Lampredi (writing in 1788) says:—' But notwithstanding the extent to which some writers have pushed this strange opinion, born in times in which nations believed themselves absolute masters of immense tracts of the vast sea, that they have arrived at believing and maintaining that vessels of war especially must be considered part of the territory of the nation of which they hoisted the flag, not only in the vast waters of the sea, which do not admit of occupancy, but also in the waters which are occupied (territorial), and also when they have cast anchor in harbours, roadsteads, bays, or waters of foreign nations, which is utterly false, since in the territory of a sovereign there is neither place nor person over which the sovereign does not exercise supreme authority ; nor does the character of the conveyance—i.e., by land or water—in which foreigners enter the confines of the territory, nor the number, alter in the slightest degree the right of the sovereign.' The same author, referring to the fact that commanders of vessels of war in territorial foreign waters exercise supreme power, even of death, and that from thence some not very farseeing authors deduce that the ship is foreign territory, since if it were the territory of the sovereign of the harbour, such a solemn act of power could not be carried out, says—' This illusion disappears as soon as it is remembered that this extension of jurisdiction is not founded upon the *jus territorium*, but upon the nature of the military command, which it is understood remains intact and in full vigour so often as the sovereign of the place is pleased to receive a ship of war as such. This could not be the case, nor could the character of a vessel of war be continued, or the vessel of war governed without the continuance of the military command, which in consequence continues to be exercised to its full extent inside the ship more by concession of the sovereign who receives the ship than by the right of the commander, and still less by any right of the *jus territorium* ; hence it happens that with the exception of the military command, which, owing to the quality and nature of a ship of war, remains intact, in every

¹ The 'Santissima Trinidad,' 7 *Wheat. R.*, 283.

other respect the ship is considered the territory of the sovereign of the port, and the men of the ship are subject to his jurisdiction. This is so true that it is the common doctrine that even a foreign army which passes through or stays upon the territory of another is subject to the jurisdiction of the place, with the exception of the exercise of the military command, which remains intact in the person of the commander by the tacit consent of the sovereign himself, who, having allowed the passage and stay of the foreign army, is considered to have conceded also the military command, without which no army would exist, owing to the common-sense rule that a right being given, all is considered to be given without which that right could not be exercised.' To this he adds in a footnote :—' A criminal who has taken refuge on board a ship of war may be asked by courtesy to be surrendered, and if refused may be legitimately taken by force.'¹

Azuni endorses the principal remarks of Lampredi in their entirety, and adopts them in his treatise on Maritime Law.²

Pinheiro-Ferreira says :—' Après avoir assimilé l'hôtel de l'envoyé au territoire de son pays, les auteurs ont cru, et avec plus de raison, il faut l'avouer, que les vaisseaux de guerre devaient aussi être considérés comme des portions détachées du territoire auquel ils appartiennent, lorsqu'ils sont mouillés dans un port étranger ; les malfaiteurs du pays doivent trouver à leur bord un asile aussi inviolable que dans l'hôtel de l'ambassadeur ou dans les pays mêmes auxquels ces vaisseaux appartiennent. Cette application de leur chimérique fiction aux vaisseaux de guerre est encore plus dénuée de raison que lorsqu'il s'agit de l'hôtel et des équipages de l'ambassadeur.'³

On this Hautefeuille observes :—' Sans discuter longuement cette question, je me bornerai à faire remarquer que le fait de recevoir à bord un sujet de ce souverain (propriétaire) est un fait extérieur, complètement étranger au gouvernement du bâtiment, un rapport avec le territoire du prince étranger ; et que, par conséquent, d'après les principes mêmes qui servent de fondement à la qualité territoriale du navire, il rentre dans la juridiction du peuple propriétaire du port dans lequel se trouve le bâtiment ; c'est par ce motif que sur

¹ Lampredi, *Tratt. del Comm.*, p. i. ch. x.

² Azuni, *Droit Marit. de l'Europe*, cap. iii. art. viii. ; Grotius, *De Jure Belli*, lib. ii. cap. iii. § 8.

³ Pinheiro-Ferreira, *Cours de Droit Public*, tit. ii. art. xviii. § 50.

le droit d'asile des coupables à bord des bâtiments étrangers, je partage l'opinion du traducteur de Lampredi et de Pinheiro-Ferreira.¹

Bluntschli thus explains the question :—‘ Exceptionnellement on accorde l'exterritorialité aux navires de guerre étrangers lorsqu'ils sont entrés dans les eaux d'un état avec la permission de ce dernier. L'exterritorialité des navires de guerre repose sur des bases encore plus contraires à la nature que l'exterritorialité des souverains. C'est une concession réciproque que se font les états maritimes, un usage qui, en ayant l'air de reposer sur les rapports de bonne amitié entre les nations, a pour vrai motif la difficulté et le danger pour la police locale d'agir efficacement contre les équipages des navires de guerre. Mais pour que cette exterritorialité soit accordée, il faut toujours que le navire de guerre étranger ait reçu l'autorisation de pénétrer dans les eaux dépendant du territoire de l'état. Les souverains, pour jouir en pays étranger des privilèges de leur rang, doivent également demander au gouvernement du pays l'autorisation de passer la frontière. Les immunités dont les navires de guerre jouissent vis-à-vis de la police et de la justice locales ne s'appliquent qu'au navire lui-même : elles cessent si l'équipage du navire de guerre, tout en restant à bord, vient à commettre contre les autres navires au mouillage, ou contre les habitants du port, des actes de nature à troubler l'ordre public. L'autorité locale a dans ce cas pleinement le droit de prendre les mesures nécessaires dans l'intérêt de la sûreté générale, et peut même ordonner au navire de guerre étranger de quitter le port. Lorsque l'équipage se rend à terre et y commet des délits, il est justiciable des tribunaux ordinaires ; cependant on doit porter de suite les faits à la connaissance du commandant du navire de guerre, et chercher à s'entendre avec lui pour faire poursuivre et punir les coupables, soit par les tribunaux de la localité, soit par les autorités militaires du navire étranger. Pour être logique on devrait admettre la compétence exclusive des tribunaux du port ; mais le désir de rester en bons rapports avec les puissances étrangères a fait prévaloir l'usage d'étendre dans ce cas la juridiction maritime de l'état étranger.’²

¹ Hautefeuille, *Droits des Nations Neutres*, tom. ii. tit. vi.

² Bluntschli, *Le Droit International Codifié*, lib. iv. art. 321 (translated by Lardy).

In 1820 John Brown, a British subject, commanded a vessel engaged in the revolt against the Spanish Colonies. He was taken prisoner by the Spaniards, but escaped from prison, and took refuge on board H.M.S. 'Tyne,' lying in the port of Lima. The Spanish authorities demanded his surrender; but the captain of the 'Tyne' refused to grant it, and brought the fugitive to England. Lord Stowell (then Sir William Scott), being requested by the Admiralty, gave his opinion on the question in the following terms:—"Sir,—I have to acknowledge the receipt of your letter dated the 25th ult., enclosing copies of a letter and its enclosures from Captain Falcon, of H.M.S. "Tyne," and of the case and opinion of the King's Advocate, relative to Mr. John Brown, a native of Ireland, who, being a prisoner in the hands of the Spaniards, effected his escape and came on board the "Tyne" at Callao, and has since arrived on board the same within the realm of England (having claimed the protection of the flag), and acquainting me that their Lordships conceiving that they had no authority to detain him, and being supported in that opinion by the concurrence of the King's Advocate, had allowed him to depart without restraint. Upon this statement I have no observation to make, not being desired by their Lordships to make any; but if my opinion had been required, it would have coincided with what has been advised and done. A more extensive and important question is proposed to me, viz.: "Whether any British subject coming on board any of H.M.'s ships of war, in a foreign port and from the judicature of the State within whose territory such port may be situated, is entitled to the protection of the British flag, and to be deemed as within the Kingdom of Great Britain and Ireland?" Upon this question, proposed generally, I feel no hesitation in declaring that I know of no such right of protection belonging to the British flag, and that I think such a pretension is unfounded in point of principle, is injurious to the rights of the countries, and is inconsistent with those of our own. The rights of territories are local, and are fixed by known and determined limits. Ships are mere movables, and are treated as such in the general practice of nations. It is true that armed neutralities have attempted to give them a territorial character, but the attempt when made has been always most perseveringly, and at all hazards, resisted and defeated by

the arms of our country, as inconsistent with the rights of hostility and capture. No such character is allowed to protect ships of war when offending against the laws of neutrality upon the high seas, where no local authority whatever exists ; still less can it be claimed where there is a visible and acknowledged authority, belonging to an independent State, in amity with the nation to which the ships of war belong. Such a claim can lead to nothing but to the confusion and hostility which wait upon conflicting rights. The common convenience of nations has for certain reasons, and to a certain extent, established in favour of foreign ships of war that they themselves shall not be liable to the civil process of the country on whose ports they are lying, though even the immunity has been occasionally questioned. But that individuals, merely belonging to the same country with the ships of war, are exempt from the civil and criminal process of the country in its ordinary administration of justice by getting on board such ship, and claiming what is called the protection of the flag, is a pretension which, however heard of in practice occasionally, has no existence whatever in principle. If the British flag converts a man of war into a British territory, the flag of other nations must be allowed to possess the same property in their marine ; for there is no principle whatever that can be appropriated exclusively to the British flag. It, therefore, must be allowed reciprocally that a Spaniard getting on board a Spanish ship of war lying in Portsmouth harbour shall be protected from British justice. I believe the administration of that justice would return a very speedy and decisive negative to any such pretension on behalf of Spaniards charged with being amenable to British law. But the inconvenient effects of considering such a ship a Spanish territory would go much further—to the extent even of protecting a British criminal who found his way into her. For no process of British justice can be executed on a British subject in a foreign territory. When I give this as my decided persuasion upon this subject generally, I do not mean to say that in the infinite possibility of events cases may not arise in which such a protection might be indulged. But such cases are justified only by their own peculiar and extraordinary circumstances, which extend no further than to those immediate cases themselves, and furnish no rule of general practice in such as are ordinary. How

far the case of Mr. Brown comes within such a description I am not enabled to state confidently by any exact knowledge of the facts, and particularly of the nature and validity of that authority under which the acts charged upon him by the Spaniards are said to have been committed. It would be improper in me to define what the British Government had not thought proper to define. Holding the opinion that before any Act of Parliament or proclamation issued, it was unlawful for a British subject to accept a hostile commission from any persons either in war or rebellion against a State in amity with the Crown of Great Britain, I am led to think that the Spaniards would not have been chargeable with illegal violence if they had thought proper to employ force in taking this person out of the vessel (British), and I add that it was certainly very undesirable to furnish occasions for the lawful use of force in the intercourse of friendly nations. Taking the authority under which Brown acted to be clearly invalid (which I do not mean to assert), I think it might possibly appear that Captain Falcon's conduct was more to be commended for its humanity and spirit than for its strict legality.—William Scott, Grafton Street, 28th November, 1820.'

**Private
vessels in
foreign
ports**

§ 26. Private vessels of one State entering the ports of another, are not, in general, exempt from the local jurisdiction, unless by express compact, and to the extent provided by such compact. But there are certain exceptions to this rule, which result from the right of asylum, based on the laws of humanity. A vessel driven by stress of weather, or carried by unlawful force, into a prohibited port, or into an open port, with prohibited articles on board, incurs no penalty or forfeiture in either case. The cases of blockade and carrying contraband are familiar examples of the principle. But the rule of law, and the comity and practice of nations, go much farther than these cases of necessity, and allow a merchant vessel of one State coming into an open port of another, voluntarily, for the purposes of lawful trade, to bring with her, and keep over her, to a very considerable extent, the jurisdiction and authority of the laws of her own country, excluding, to this extent, by consequence, the jurisdiction of the local law. This jurisdiction of a nation over its vessels, while lying in the port of another, is wholly exclusive. For any unlawful acts done by her while thus lying in the port

of another State, and for all contracts entered into while there, by her master or owners, she is made answerable to the laws of the place. Nor, if her master or crew, while on board in such port, break the peace of the community by the commission of crimes, can exemption from the local laws be claimed for them. But the comity and practice of nations have established the rule of international law that such vessel so situated is not, as termed by Lord Stowell, a 'mere movable,' but that she is for the general purpose of governing and regulating the rights, duties, and obligations of those on board, to be considered as under the jurisdiction of, and a part of the territory of, the nation to which she belongs. The local authorities, therefore, have a right to enter on board a foreign merchantman in port, for the purpose of enquiry universally, but, according to M. Ortolan and to M. Massé, for the purpose of arrest only in matters within their ascertained jurisdiction. It therefore follows, as a sequel to the argument of these French writers, that, with respect to facts happening on board which do not concern the tranquillity of the port, or persons foreign to the crew, or acts committed on board while such vessel was on the high seas, they are not amenable to the territorial justice, and that all such matters are justiciable only by the courts of the country to which the vessel belongs. So firmly is this doctrine incorporated into the French practice that they regard it as a positive rule of international law, and the French laws do not hesitate to prescribe that, when crimes are committed on board a French vessel in a foreign port by one of the crew against another of the same crew, the French consul is to resist the application of the local authority to the case.¹ This doctrine is not supported by English writers, for a person who enters a foreign port in

¹ Ortolan, *Dip. de la Mer.*, tit. i. pp. 292-310; Massé, *Droit Commercial*, tom. ii. p. 63; Legaré, *Opinions of U.S. Attys.-Genl.*, vol. iv. p. 98; De Clercq, *Formulaire*, tom. i. p. 366, tom. ii. p. 65; the 'Creole,' *Com. between U. S. and G. B.*, p. 241; the 'Enterprise,' *Com. between U. S. and G. B.*, p. 187; Hello, *Revue de Législation*, tom. xvii. p. 143; Wirt, *Opinions of U. S. Atty.-Genl.*, vol. ii. p. 86; Berrien, *Opinions of the U.S. Attys.-Genl.*, vol. ii. p. 378; Reg. v. Sattler, *D. and B.*, C. C., 525; Reg. v. Anderson, 38 *L. J.* (M.C.), 12; the 'Atalanta,' *Opinion of the U. S. Atty.-Genl.*, viii. 73; the 'Carlo Alberto,' Sirey's *Recueil*, xxxii. 578. The liability of a shipowner for damage done by his ship to a pier jutting out into the sea, but attached to the soil of a foreign country (Spain), was held to be governed by English law, not by the *lex loci*. (The 'M. Moxham,' 33 *L. T.*, 463.)

a private ship becomes while there temporarily a subject of the foreign State, owing a 'local allegiance' to its laws, though he is also subject to the jurisdiction of his own flag. He cannot refuse to obey the local laws; nor can the claim of the local authorities to board the ship, search her, and take out of her anyone who has become amenable to those laws be disputed or resisted.

**Summary
of the
judicial
powers of
a State**

§ 27. It may be stated in general terms that the judicial power of every sovereign State extends: 1st. To all civil proceedings, *in rem*, relating to immovable or real property within its territory; 2nd. To all civil proceedings, *in rem*, relating to movable or personal property within its territory; 3rd. To all mixed actions, relating to real and personal property within its territory; 4th. To all its public and private vessels on the high seas, to its public vessels and their prizes in foreign ports, and, in certain cases, to its private vessels in foreign ports; 5th. To all controversies respecting personal rights and contracts, or injuries to the person or property, when the person resides within the territory, wherever the cause of action may have originated. In this class of controversies, the judicial power may or may not be exercised, according as is provided by municipal law. This general principle is entirely independent of the rule of the decision which is to govern the tribunal.

With respect to criminal matters, the judicial power of the State extends,¹ with certain qualifications: 1st. To the punishment of all offences against its municipal laws, by whomsoever committed, within its territory; 2nd. To the punishment of all such offences, by whomsoever committed, on board its public or private vessels on the high seas and on board its public vessels, and, in some cases, on board its merchant vessels in foreign ports;² 3rd. To the punishment of all such

¹ Phillimore, *On Int. Law*, pt. iii. chs. xviii.-xx.; Story, *Conflict of Laws*, §§ 530-583; Henry, *Foreign Law*, chs. viii. et seq.; Gardner, *Institutes*, pp. 1-37.

² By the law of England the criminal jurisdiction of the Admiralty of England extends over British ships not only on the high seas, but also in foreign rivers below the bridges, where the tide ebbs and flows, and where great ships go, though at a spot where the municipal authorities of a foreign country might exercise concurrent jurisdiction, if invoked. Therefore a foreigner was convicted at the Central Criminal Court of manslaughter, committed on board a British vessel in the River Garonne in the French empire, about 35 miles from the sea, and about 300 yards from the nearest shore, within the flow and ebb of the tide; the conviction was held right,

under the 4 & 5 Will., c. 36, § 22. (*R. v. Anderson*, 38 *L.J.* (M.C.), 12.) A prisoner was indicted at the Central Criminal Court for larceny committed out of an English vessel lying in a river at Wampu, in China, twenty or thirty miles from the sea ; the prosecutor gave no evidence as to the tide flowing or otherwise at the place where the vessel lay ; the judges held that the Admiralty had jurisdiction, it being a place where great ships go. (*R. v. Allen*, 1 *Mood*, C.C., 494. See also *R. v. Depardo*, 1 *Taunt.*, 26 ; and *Reg. v. Carr* (1882), 10 Q. B. D., 76.)

It is doubtful whether, under the 9 Geo. IV., c. 31 (repealed by the 24 and 25 Vict., c. 95), a foreigner was indictable in England, as principal or as accessory, for an attempt to assassinate abroad (*R. v. Bernard*, 1 *F. and F.*, 240 ; and see *R. v. Helsham*, 4 *C. and P.*, 394). A foreign sailor was indicted in England under this statute for stabbing and killing a shipmate on shore at Zanzibar ; the death took place on board. The offence was held not to be within the statute (*R. v. Matton*, 7 *C. and P.*, 450). But a British subject was convicted, under this statute, of the murder of a foreigner out of the Queen's dominions (*R. v. Azzopardi*, 2 *Moody*, C. C., 288). See also *R. v. Sawyer*, *R. and R.*, 294, under the 33 Hen. VIII., c. 23, and the 24 and 25 Vict., c. 100. A prisoner was indicted in England, under 24 and 25 Vict., c. 97, § 42, for conspiracy to destroy a foreign merchant ship. It being admitted that the prisoner was a party to the scuttling on the high seas, the jury were directed to consider whether the prisoner was a party in England to a previous plan to destroy the ship, the principal offence not being triable in that country. (*R. v. Kohn*, 4 *F. and F.*, 68.)

Chilian subjects were ordered by their Government to be banished to England. The master of an English merchant vessel lying in the territorial waters of Chili contracted to, and did, bring them to England. The master, on his arrival in England, was indicted and convicted of assault and imprisonment on the Chilian subjects. Held by the Court of Crown Cases Reserved that the conviction could not be supported for what occurred in Chilian territorial waters, but that the justification ceased when the line of Chilian waters was passed. Persons, whether foreign or British, on board an English ship on the high seas, out of any foreign territory, are as much amenable to English law as they would be on English soil. (*R. v. Lesley*, *Bell.*, C. C., 220.) A foreigner was tried in England for manslaughter on board ship, several thousand miles from England, and two hundred miles from any land. The registered sole owner was an alien born, but described in the register as of London, merchant ; and the ship sailed under the British flag. As there was no evidence that the owner had been naturalised or had obtained letters of denisation, it was held that there was no evidence that the ship was British, and consequently that the prisoner could not be convicted in England of this offence. (*R. v. Bjornsen*, *L. and C.*, 545.)

With respect to trial of crimes committed on the high seas, in the British colonies or other places out of the British dominion, in which the Crown has jurisdiction, see 6 and 7 Vict., c. 94 ; and the 12 and 13 Vict., c. 96, § 1 enacts that 'if *any person* within any colony shall be charged with the commission of any treason, piracy, felony, . . . or other offence of what nature or kind soever committed upon the sea, or in any haven . . . where the admiral or admirals have power or jurisdiction ;' or if any person so charged shall be brought to trial in any colony, the courts of the colony have jurisdiction to try the case. This statute is extended to India by the 23 and 24 Vict., c. 88. The words in this statute 'where the admiral or admirals have power or jurisdiction' cannot be construed to extend to offences committed at sea or in foreign ports in other than British ships.

By the 17 and 18 Vict., c. 104, § 267 (Merchant Shipping Act of 1854), 'All offences against property or persons committed in or at any place

offences by its own subjects, wheresoever committed ;¹ 4th.

either ashore or afloat out of her Majesty's dominions by any master, seaman, or apprentice who at the time when the offence is committed is, or within three months previously has been, employed in any British ship shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively and be inquired of, heard, tried, determined, and adjudged in the same manner and by the same courts and in the same places as if such offence had been committed within the jurisdiction of the Admiralty of England.'

¹ If any person, being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, or in any foreign port or harbour, or if any person, not being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, is *found* within the jurisdiction of any court of justice in her Majesty's dominions, which would have had cognisance of such crime or offence if committed within the limits of its ordinary jurisdiction, such court shall have jurisdiction to hear and try the case as if such crime or offence had been committed within such limits. (18 and 19 Vict., c. 91, § 21.) It has been decided that the word 'found,' above mentioned, is to be construed 'found at the time of trial.' (R. v. Lopez, 1 D. and B., C. C., 525.)

If any British subject commits any crime or offence on board any foreign ship *to which he does not belong*, any court in the British dominions which would have had cognisance of such crime or offence if committed on board a British ship within the limits of the ordinary jurisdiction of such court, shall have jurisdiction in the case. (30 and 31 Vict., c. 124, § 11.)

In the statutes 24 and 25 Vict., c. 95, § 115 ; c. 97, § 72 ; c. 98, § 50 ; c. 99, § 36 ; c. 100, § 68, for the consolidation of the criminal law of Great Britain provisions are contained, by which the indictable offences which shall be committed within the jurisdiction of the Admiralty of England or Ireland, shall be deemed to be offences of the same nature, and liable to the same punishments, as if they had been committed upon the land in England or Ireland.

Any offence against the British Foreign Enlistment Act, 1870, 33 and 34 Vict., c. 90, may be described in any indictment or other document relating thereto, as having been committed at the place where it was wholly or partly committed, or it may be averred generally to have been committed within her Majesty's dominions, and the venue or local description in the margin may be that of the county, city, or place in which the trial is held.

By 29 and 30 Vict., c. 87, it is lawful, by order in council, made under the Foreign Jurisdiction Acts, 6 and 7 Vict., c. 94, and 28 and 29 Vict., c. 116, to assign to, or confer on any court, in any British possessions out of the United Kingdom, any jurisdiction, civil or criminal, original or appellate, which any order in council might assign to or confer on any court in any country or place out of the British dominions, within which her Majesty has power or jurisdiction, and further to make provision respecting the enforcement and execution of the judgments, decrees, orders, and sentences of any such court, and respecting appeals therefrom.

The venue of indictments for high treason, or misprison of treason committed out of the realm of England, may be laid in the Queen's Bench, or in such shire as the Queen may appoint, if she appoint a commission to try the offender. (35 Hen. VIII., c. 2, § 1 ; 5 and 6 Ed. VI., c. 11, § 6.) Treasons committed in Ireland or Scotland since the Union, or in Wales, are not within the 35 Hen. VIII., c. 2 ; but treasons committed in

To the punishment of piracy, and other offences against the law of nations, by whomsoever and wheresoever committed.¹

§ 28. The power of a State over the person of the party **Extradition of criminals** guilty of, or charged with, criminal offences, is necessarily limited to the extent of its own territory, or to the high seas which is the common territory of all, or to its vessels in foreign ports. However, there are precedents of criminals being followed by the offended State into the State in which they have taken refuge, arrested, and brought to justice in the former country. The case of the Duke d'Enghien, who was seized on Baden territory in 1804 by Bonaparte, and brought back to France, is well known. The troops of the United States marched into the Spanish province of Florida in 1818 to repress the incursions of the Seminole Indians; and again in 1877 the United States ordered troops to pass the Mexican frontier when necessary for the purpose of seizing and punishing Mexican and Indian marauders. No sovereign State is bound, unless by special compact, to deliver up persons, whether its own subjects or foreigners, charged with, or convicted of, crimes under the laws of another country, upon the demand of a foreign State or its officers. The extradition of persons charged with, or convicted of, criminal offences affecting the general peace and happiness of society, is voluntarily practised by most States, where there are no special compacts, as a matter of general convenience and comity. Some distinguished jurists have treated this question as a matter of strict right, and as constituting a part of the

the Isle of Man, Guernsey, Jersey, Sark, and Alderney, or in British foreign plantations, are, although they are parts of the dominion of England, but not parts of the realm. See further Coke, *Inst.*, 3 and 4, *sub voce* 'Treason.'

¹ Although a port is *locus publicus uti pars oceani*, it is also *infra corpus comitatus*. Therefore a robbery or assault committed by a pirate in an English haven is not *piracy*, for it is not committed on the high seas; and being within a county, is, independently of the 28 Hen. VIII., c. 15, punishable at Common Law. Before this statute piracies and other felonies upon the high seas were tried according to the forms of Civil Law. By the 39 Geo. III., c. 37 (extant), '*all and every offence and offences, which, after the passing of this Act, shall be committed upon the high seas out of the body of any country of this realm, shall be, and they are hereby declared to be, offences of the same nature respectively, and to be liable to the same punishments respectively, as if they had been committed upon the shore; and shall be enquired of, heard, tried and determined, and adjudged in the same manner as treasons, felonies, murders, and confederacies are directed to be by the same Act*' (i.e. 28 Hen. VIII., c. 15).

law and usage of nations. Others, equally distinguished, explicitly deny it as a matter of right. The weight of authority is in favour of regarding it as a matter of comity, rather than of strict right, under the rules of international law as universally received and established among civilised nations. If it be regarded as a right at all, it is one of those *imperfect* rights which cannot be enforced, as the obligation on the other party is also imperfect, and not universally, even if generally, admitted.

In 1173 the ambassadors of the Abassines were treacherously slain by one of the Templars at Jerusalem. On demand being made to deliver up the offender, the Grand Master absolutely refused to do so, but added that he had prescribed penance to the culprit, and ordered him to be sent to the Pope.¹ In the reign of Edward II. some Florentine merchants having been appointed collectors and receivers of the King's customs and rents in England, Wales, Ireland, and Gascony, fled to Rome, carrying some of the money which they had collected with them. The King sent his letters of request to the Pope to desire that they might be arrested, and their persons and goods seized, and sent to England to satisfy the loss which he had sustained, promising, nevertheless, that they should not lose limb or life. The Pope seems to have acted as requested.² In the same reign one Anthony Fazons, who had received 500*l.* of the King, fled with the same to Lorraine. The King wrote to the Duke of Lorraine that the fugitive might be arrested and his goods seized, wheresoever they might be in that territory, in order that satisfaction be made to him.³ Edmond de la Pool (or Pole, Earl of Suffolk) being attainted by Act of Parliament in the twelfth year of Henry VII., fled to Spain. The King of Spain continuously refused to deliver him to England, but eventually did so on receiving the promise that the Earl should not be put to death. Napper Tandy, and other political offenders of 1798, were given up by the Senate of Hamburgh to the Government of George III.⁴ The leading principle in all these cases appears to have been the comity of nations. And it has been argued that offences which tend to the destruction of society or government, such as treason, are subject to punishment

¹ *Tyrius*, lib. 20, cap. 23.

² *Rott. Romæ*, n. 4, E. 2, m. 17, *Dorso*.

³ *Claus* 8, E. 2, m. 32, *Dorso*.

⁴ 27 *How. State Trials*, 1191.

everywhere, and that the ruler of that State whither the guilty party fled has a right of prosecuting him ; since in matters of commerce subjects of one State can sue their debtors in another State, *a fortiori*, princes who have received injury have a right to require the punishment of the evil-doer.¹ Being a mere matter of comity, extradition has sometimes required the support of a treaty obligation ; one of the best known instances of which is the treaty between Great Britain and Denmark, Feb. 13, 1660, by the fifth article of which it was provided ' that if any of them who are guilty of the horrid murder committed upon Charles I., of blessed memory, be either now in the dominions of the King of Denmark and Norway, or shall hereafter come thither, that as soon as it shall be known or told to the King of Denmark, or any of his officers, they be forthwith apprehended, put in safe custody, and sent back into England, or be delivered into the hands of those whom the King of Great Britain shall order to take charge of them and bring them home.' Three of the regicides were surrendered by Denmark.

On the other hand, extradition has sometimes been refused. The King of Scotland refused to deliver up Perkin Warbeck (who was contending for sovereign power) to Henry VII., who had claimed him as a person not protected by the law of nations, saying that he, the King of Scotland, ' for his part, was not competent judge of Perkin's title, but that he had received him as a suppliant, protected him as a person fled for refuge, espoused him with his kinswoman, and aided him with arms, upon the belief he was a prince, and therefore he could not now, consistently with his honour, negative, and, in a sort of way, put a lie upon all that he had said and done before, as to deliver him up to his enemies.'² Cardinal Pole having in his book *Pro Ecclesiasticæ Unitatis Defensione* (lib. iii. 79) strongly suggested that the Emperor Charles should wage war against Henry VIII., that monarch demanded his extradition from the French King to answer for the alleged treason. The Cardinal was at that time Ambassador from the Pope to the French Court, and the

¹ Weyer's case, 5 *Jac. in B.R.*, Rolles abridg., fol. 530. See further *Moore v. Kaye*, 4 *Taunt.*, 34 ; *East India Co. v. Campbell*, *Ves. sen.* 246.

² Lord Bacon's *Hist. of Henry VII.*, fol. 176.

King refused to deliver up the Ambassador.¹ Queen Elizabeth was equally unsuccessful. She demanded that Morgan and other British subjects who had committed treason, should be delivered up to her by the French King, Henry IV. But he refused; for, said he, 'Si quid in Gallia machinarentur, Regem ex jure in illos animadversurum; sin in Anglia quid machinati fuerint, Regem non de eisdem cognoscere et ex jure agere; omnia regna profugis esse libera, regum interesse ut sui quisque regni libertates tueatur.'

In 1811, Mr. Justice Heath, sitting in the Common Pleas, observed: 'It has generally been understood that wheresoever a crime has been committed, the criminal is punishable according to the *lex loci* of the country, against the law of which the crime was committed; and by the comity of nations, the country in which the criminal has been found has aided the police of the country against which the crime was committed, in bringing the criminal to punishment. In Lord Loughborough's time the crew of a Dutch ship mastered the vessel, and ran away with her, and brought her into Deal, and it was a question whether we could seize them and send them to Holland; and it was held we might.'²

In 1819 one Daniel Washburn was brought up on a *habeas corpus* and charged with theft in Canada. Chancellor Kent held that a State was bound, irrespectively of treaties, to surrender fugitive criminals, and that a magistrate, irrespectively of legislation in that regard, was bound to commit the accused upon proof of the commission of a crime, so as to enable either the home government to extradite the prisoner, or the foreign government to demand him; the prisoner could require his discharge on *habeas corpus*, if not claimed within a reasonable time; whether the prisoner was a subject of the pursuing government or of the home government was immaterial.³ But in 1835 Judge Barbour (in the Circuit Court) refused to detain a foreigner in prison for the purpose of surrender to his own country, on the ground that without a treaty stipulation the Government of the United States was not

¹ *Coke*, lib. iii., *sub voce* 'Treason.' The refusal of the French King was the origin of a treatise, written, or caused to be written, by Henry VIII., to prove that traitors should always be delivered up to their proper sovereign. Lord Coke writes that he has seen the treatise.

² *Mure v. Kaye*, 4 *Taunt.*, 43.

³ 4 *Johns Ch. R.*, 106.

under any obligation to surrender a fugitive from justice to another Government for trial, and that, as a judicial officer of the United States, he had no authority whatsoever either to arrest or detain with a view to such surrender.¹ And in 1837 Mr. Justice Story followed this example.²

But in 1864 the United States delivered up one Arguelles to Spain, although there was no extradition treaty between those countries, nor any Act of Congress relating to the same. Mr. Seward said that the extradition was understood to have been effected by virtue of the law of nations, and the constitution of the United States.³

And in 1873, on the same principle, the Spanish Government delivered up one Bidwell to the British Government, there then being no treaty of extradition between those Governments.

It is against the law of England to send a subject out of the realm without some legal provision to that effect. For this reason a treaty of extradition between England and a foreign country could not formerly be enforced without a special Act of Parliament. But this is no longer necessary since the passing of the 33 and 34 Vict., c. 52 (amended by 36 and 37 Vict., c. 60), which is a general Extradition Act.

It has been held in the United States that a treaty, being the supreme law of the land, is entitled, when brought to the notice of courts of law, to the same consideration as an Act of Congress.⁴ However, in consequence of some technical difficulties suggested in that case, 'An Act for giving effect to certain Treaty Stipulations between this and foreign Governments for the Apprehension of and Delivering up certain Offenders' was passed by the United States on August 22, 1848, and applies to all extradition treaties. On June, 22, 1860, this Act was amended as regards papers to be offered in evidence, and it was further amended on March 3, 1869.⁵

§ 29. A criminal sentence, pronounced under the municipal law of one State, can have no legal effect in another. If ^{Criminal sentences}

¹ 2 *Brock and Marsh*, 493.

² *U. S. v. Davis*, 2 *Sumn.*, 485 ; see also *Opinions of Attys.-Genl.*, iii., 660 ; *Holmes v. Jennison*, 14 *Peters*, 541.

³ *U. S. Dipl. Corr.*, 1864, pt. ii. 60-74.

⁴ *Re Metzger*, 5 *How. R.*, 117.

⁵ See also *re Kaine*, 14 *How. R.*, 103 ; *re Van Cernam*, *Upp. Can. R.*, 4 *C.P.*, 288.

it be a conviction, it cannot be executed without the limits of the State in which it is pronounced ; and if such conviction be attended with civil disqualifications in the country where pronounced, these disqualifications do not follow the offender into another independent State. In the words of Martens, 'a sentence which attacks the honour, rights, or property of a criminal, cannot extend beyond the courts of the territory of the sovereign who has pronounced it, so that he who has been declared infamous, is infamous in fact but not in law. And the confiscation of his property cannot affect his property situate in a foreign country. To deprive him of his honour and property, judicially, there also, would be to punish him a second time for the same offence.' It follows, from this well-established principle, that if a delinquent should fly from one jurisdiction to another, for the purpose of obtaining a milder punishment or an acquittal in the tribunals of the country where he should take refuge, such sentence would be a nullity, and of no avail to protect him against a prosecution in the State to which he owed allegiance, or in which the crime was committed. But a conviction or acquittal in the State where the offence was committed, or to which he owed allegiance, would, of course, be an effectual bar to a prosecution in any other State.¹

**Foreign
judgments**

§ 30. The conclusiveness of foreign sentences and judgments, where they are drawn in question in the tribunals of another State, will depend upon the nature of the action and the usage of the different nations, and the special compacts between them. In personal actions, *res adjudicata*, in one

¹ Martens, *Précis du Droit des Gens*, §§ 86, 94, 104. An act of a subject in a foreign country may be no offence against the laws of that country, yet be an offence against the laws of his own country. He is tried abroad, and acquitted on the ground *that the act is no offence*, or *that there is no jurisdiction to try him*. He returns home, and may, under such circumstances, be tried and convicted. Thus, in the case of *Reg. v. Keyn* (2 *L.R.*, Exch. D.), the master of the German vessel being acquitted in Great Britain on the ground of want of jurisdiction to try him, was tried and convicted by his own authorities on his return to Germany. And an Englishman or other person making a false affidavit abroad, before a British Consul, the affidavit being for use in an English court of justice, may not be punishable abroad (e.g. the foreign law may forbid British consuls to administer oaths), but he may be punished on his return to England for a misdemeanour in procuring an English Court to act upon the credit of a false and fraudulent voucher. (*O'Mealey v. Newell*, 8 *East*, 372 ; 'Extraterritorial Oaths,' *The Law Magazine*, No. 239, p. 167.)

country, can have, *per se*, no effect in another. The effect attached to a foreign judgment is different in different countries. In English and American courts a foreign judgment is *prima facie* evidence where the party claiming the benefit of it applies to have it enforced, and it lies on the defendant to impeach the justice of it or to show that it was irregularly obtained.

It must be final and conclusive between the parties, for the English Court will not reopen the original cause of action. An action on a foreign judgment in England has always been treated as an action of debt.

But if it appears, from the record of the proceedings upon which the original judgment was founded, that it was fraudulently obtained, or resulted from false premises, or a palpable mistake of the law applicable to the case, it will not be enforced. In France, the operation of a foreign judgment is restrained within still narrower limits. As between different States, united together into a composite State or federal union, the organic constitution, or municipal law, will determine the degree of credit and effect which a judgment obtained in one shall have in the other States. Thus, in the United States of America, a judgment in one State has, in all the others, the conclusive effect of a domestic judgment.¹

In most continental countries, foreign judgments are not treated as new causes of action, but are admitted to execution or declared executory, as it is called, after a special proceeding for that purpose.

§ 31. Foreign judgments or sentences of a court of competent jurisdiction, proceeding *in rem*, such as the sentences of prize courts, courts of admiralty, and revenue courts, are, except where impeachable for fraud, conclusive as to the proprietary interest in, or title to, the thing in question, wherever the same comes incidentally in controversy in the tribunals of another State. 'Whatever doubts may exist,' says Wheaton, 'as to the conclusiveness of foreign sentences, in respect of

Judgment
of prize
courts,
&c., in
rem

¹ Kent, *Com. on Amer. Law*, vol. ii. p. 119 ; Klüber, *Droit des Gens*, § 59 ; Foelix, *Droit Int. Privé*, §§ 293-311 ; Frankland *v.* McGusty, 1 *Knapp R.*, p. 274 ; Becquet *v.* McCarty, 3 *B. and A. R.*, p. 951 ; Mills *v.* Duryee, 7 *Cranch R.*, p. 481 ; Hampton *v.* McConnell, 3 *Wheaton R.*, p. 234 ; Riquelme, *Derecho Púb. Int.*, lib. ii. tit. i. cap. ix. ; Westlake, *Private Int. Law* (2nd edit.), ch. xvii. ; Meyer *v.* Ralli, 1 *L. R.*, C.P.D., 358 ; Reimers *v.* Druce, 23 *Beav.*, 156 ; Godard *v.* Gray, 6 *L. R.*, Q.B., 139 ; Gardner, *Institutes*, p. 146

facts collaterally involved in the judgment, the peace of the civilised world, and the general security and convenience of commerce, obviously require that full and complete effect should be given to such sentences, wherever the title to the specific property, which has been once determined in a competent tribunal, is again drawn in question in any other court or country.' ¹

In the Admiralty Court of England (now termed Admiralty Division of the High Court of Justice) effect is given *in rem* to the sentence *in rem* of a foreign Court having admiralty jurisdiction, or what is equivalent thereto.²

Courts,
how far
judges of
their own
jurisdiction

§ 32. If a foreign Court exercises a jurisdiction which, according to the law of nations, its sovereign could not confer upon it, its sentence or judgment is not available in the Courts of any other State, and the Courts in which such judgment is brought in controversy will determine the question of jurisdiction for themselves, and the same may be said where sufficient notice has not been given to the defendant; but so far as its jurisdiction depends upon municipal law, or its proceedings are governed by municipal rules, it is the exclusive judge of its own jurisdiction and of the regularity of its own proceedings, and its decision on these points binds the world. 'Of its own jurisdiction,' says Chief Justice Marshall, '*so far as depends on municipal rules*, the Court of a foreign nation must judge, and its decision must be respected.'

¹ Wheaton, *Elem. Int. Law*, pt. ii. ch. ii. § 18; Vattel, *Droit des Gens*, liv. ii. ch. vii. §§ 84, 85; Story, *Conflict of Laws*, §§ 585, 591-593; Croudson v. Leonard, 4 *Cranch R.*, p. 434; Gilston v. Hoyt, 3 *Wheaton R.*, p. 246; Duchess of Kingston case, 11 *Howell's State Trials*, p. 261; Massé, *Droit Commercial*, tom. ii. §§ 298-325. By the sentence of a French Court of Admiralty it appeared that a ship insured as *warranted American* had been condemned as enemy's property for want of having on board a *rôle d'équipage*, or list of the crew, such as is required by marine ordinance of France, and adjudged by the Court there to be requisite within the meaning of the Treaty of Commerce between France and America. It was held by the Court of King's Bench to be conclusive evidence against the warrant of neutrality, though in fact the ship was American. Lord Kenyon expressed his opinion that the French Court professed to proceed according to law, but in reality made law a stalking-horse for an act of piracy, but he was concluded by the French judgment. (Geyer v. Aguilar, 7 *J. R.*, 681; and see Castrique v. Imrie, 4 *L. R.*, H.L., 420.) For cases of fraud see Shand v. Du Boisson, 18 *L. R.*, Eq. 283; Williams v. Amroyd, 7 *Cranch*, 423; Messina v. Petrococcchino, 4 *L. R.* P.C., 144; Ochsenbein v. Papelier, 8 *L. R.*, Ch. 695. A judgment rendered by a Court *de facto* is entitled to consideration in a foreign country. (4 *Binn.*, 371.)

² The 'City of Mecca,' 5 *L. R.*, P.D., 28; Wynne's *Leoline*, Jenkins, vol. ii., 762; Jurado v. Gregory, 1 *Ventr.*, 32.

If the proceedings are 'merely irregular, the Courts of the country pronouncing the sentence were the exclusive judges of that irregularity, and their decision binds the world.' Thus, if the Court of one country condemn a vessel as a prize under the *law of nations*, and the sentence is brought in controversy in the Court of another State, the latter may examine into, not only the 'authority of the former to act as a prize court,' but also 'whether the vessel condemned was in a situation to subject her to the jurisdiction of that Court.' But 'if the matter in controversy is land, or other immovable property, the judgment pronounced in the *forum rei sitæ* is held of universal obligation as to all the matters of right and title which it professes to decide in relation thereto. And this results from the very nature of the case, for no other Court can have a competent jurisdiction to inquire into or settle such right or title. By the general consent of nations, therefore, the judgment of the *forum rei sitæ* is held absolutely conclusive. *Immobilia ejus jurisdictionis esse reputantur, ubi sita sunt.* And the same principle is applied to all other cases of proceeding, *in rem*, as to movable property, within the jurisdiction of the Court pronouncing the judgment. Whatever it settles as to the right or title, or whatever disposition it makes of the property by sale, revindication, transfer, or other act, will be held valid in every other country, where the same question comes, directly or indirectly, in judgment before any other tribunal.'¹

§ 33. As a general rule, Courts do not take judicial notice of the laws of a foreign country, but they must be proved, not as facts to the jury, but as facts to the Court. The Court, therefore, decides what is the proper evidence of such laws, and of their applicability to the case in hand. The manner of proof must vary according to circumstances. The general principle is, that the best proof shall be required which the nature of the case admits of. But to require such proof of

Proof of
foreign
laws

¹ Croudson *v.* Leonard, 4 *Cranch R.*, 434; Williams *v.* Amroyd, 7 *Cranch R.*, 423; Grant *v.* McLachlin, 4 *Johns. R.*, 34; Buchanan *v.* Rucker, 1 *East*, 192; Schibsby *v.* Westenholz, 6 *L. R.*, Q.B., 155.

A French tribunal has no jurisdiction over contracts entered into between a native of France and a foreign Government. Sirey, *Arrêts de la Cour de Cassation*, 1849, p. 81. Compare herewith the case of the Duke of Brunswick *v.* King of Hanover, 1 *H. of L.*, Cas. 1.

the laws of a foreign State as its institutions and usages do not admit of, would be unjust and unreasonable. The usual modes of authenticating the written laws of a foreign country are—by the oral testimony of a trustworthy expert; by an exemplification of a copy under the great seal of the State; or by a certificate of some duly authorised officer, which certificate must be duly authenticated, or by a copy proved to be a true copy. Some States do not use any great seal for such purposes, but copies of the laws, decrees, and orders are certified to, by the minister under whose care the archives are kept, with his signature and rubric, or signature alone. In others, there is a particular officer appointed as keeper of the archives, and who is authorised to authenticate copies thereof. The rule of evidence must, therefore, vary with the institutions and usages of the country whose written laws are to be proved.

By the Act 24 and 25 Victoriæ, cap. 2, passed in 1861, if the British Government shall have entered into a Convention with the Government of any foreign State for the purpose of reciprocally ascertaining the laws of the other State, a British tribunal may remit to a foreign tribunal a case setting forth the facts and questions of law on which it desires the opinion of the foreign tribunals, and *vice versa*. This statute has hitherto been inoperative, as no such convention has been entered into. 'But foreign unwritten laws, customs, and usages,' says Story, 'may be proved, and indeed must ordinarily be proved, by parol evidence.' The usual course is to make such proof by the testimony of competent witnesses, instructed in the law, under oath. Sometimes, however, certificates of persons in high authority, Ambassadors and Consuls-General, have been allowed as evidence. These questions of evidence are generally determined by the municipal laws of the place where the foreign law is to be proved.¹

Of con-
tracts and
instru-
ments

§ 34. The same may be said of the proof of contracts, instruments, and other acts made or done in one country and

¹ Church *v.* Hubbart, 2 Cranch R., 238; in *re* Dormoy, 3 Hagg. Eccl. R., 767; Mostyn *v.* Fabrigas, Cowper R., 174; Lincoln *v.* Battel, 6 Wend. R., 475; Sussex Peerage Case, 11 Ch. and Fin., 133; Baron de Bode's case, 8 Q.B., 208; Van der Donckt *v.* Thellusson, 8 C.B., 826; *re* Klingemann, 32 L. J. (N.S.), P.M.A., 16; see also *Law Magazine and Review* for May, 1882, tit. 'Evidence of Foreign Laws,' by Sir Sherston Baker, Bart.

offered in evidence in another. In some cases, it is sufficient to prove them in the manner and by the solemnities and proofs which are deemed sufficient by the law of the place where they are executed ; and, in others, they are required to be proved according to the law of the place where the action or other judicial proceeding is instituted. On this subject, the law and practice of different States differ, as also the opinions of publicists. 'There are very few traces to be found in the reports of the common law,' says Story, 'of any established doctrines on the subject.' Where such instruments and acts can be proved according to the *lex fori*, such proofs are usually required ; but if such evidence cannot be produced, and there is no municipal law to the contrary, evidence deemed competent in the place where the instruments were executed is usually admitted in the place where the proceeding is instituted. Thus in Scotland, if the law of the foreign country allows the payment of a debt constituted by writing to be proved by parole, such proof is allowed, although if the contract had been so made in Scotland it would not be established by such evidence. In France, proof is admitted by parole of a debt contracted in England, although such proof was not admissible in such a contract made in France.¹

§ 35. Foreign judgments are, as a general rule, to be authenticated in the same manner as other instruments and documents executed in another country. The most usual mode of proof is by an exemplification under the great seal, but this is by no means the only one. The public seal of a foreign sovereign or State, affixed to a judgment, is generally the highest and most convenient evidence of its authority.

¹ Voet, *De Stat.*, ch. ii. No. 9, § 5 ; Story, *Conflict of Laws*, §§ 629, 636 ; Erskine, *Institutes*, b. iii. tit. ii. §§ 39, 40 ; Trasher *v.* Everhart, 3 Gill. and Johns. R., 234, 242 ; Cogswell *v.* Dolliver, 2 Mass. R., 217 ; Massé, *Droit Commercial*, tom. ii. §§ 326 et seq. ; United States *v.* Wiggins, 14 Peters. R., 347 ; Owings *v.* Hull, 9 Peters. R., 625 ; United States *v.* Perchman, 7 Peters. R., 85 ; United States *v.* Delespine, 12 Peters. R., 655 ; Gaines *v.* Relf et al., 12 Howard R., 522 ; Houston *v.* Perry et al., 3 Texas R., 392 ; Bowman *v.* Sandburn, 5 Foster's R., 113 ; Mauri *v.* Hefferman, 13 Johns. R., 72 ; Re Marianne Clericetti, 30 Law and Eq. R., 532 ; Riquelme, *Derecho Púb. Int.*, lib. ii. tit. i. cap. iii. ; Di Sora *v.* Phillips, 10 H. L., Cas. 624, in which last case Lord Chelmsford explains that the evidence of a *translator*—i.e. a witness to explain the meaning and grammatical construction of words—is wanted to interpret foreign instruments.

‘Courts of other countries,’ says Story, ‘will judiciously take notice of such public seal, which is therefore considered as proving itself. But the seal of a foreign Court does not prove itself, and therefore must be established as such by competent testimony. There is an exception to this rule in favour of Courts of Admiralty which, being Courts of the law of nations, the Courts of other countries will judiciously take notice of their seal, without positive proof of its authenticity.’ The Courts of Great Britain require foreign judgments and documents connected with them to be proved by examined or authenticated copies, purporting to be sealed with the seal of the Court to which the original belongs, or, in the event of such Court having no seal, to be signed by the Judge of the Court. Proof of the seal or signature is not required.¹ Chief Justice Marshal has laid down the general rule, with respect to the authentication of foreign judgments, and which is also applicable to almost all foreign documentary evidence, as follows: ‘Foreign judgments are authenticated, *first*, by an exemplification under the great seal; *secondly*, by a copy proved to be a true copy; *thirdly*, by a certificate of an officer authorised by law, which certificate must itself be properly authenticated. These are the usual, and appear to be the most proper, if not the only, modes of verifying foreign judgments. If they be all beyond the reach of the party, other testimony, inferior in its nature, might be received.’ But this inferior class of testimony will not be received unless it be shown that there was some insuperable impediment to the use of either of these modes, for, continues Chief Justice Marshal, ‘the Court cannot presume such impediment to have existed.’ There are numerous cases illustrating the application of these rules, and showing the admissibility of inferior evidence where the original documents could not be produced by the party, and where there were insuperable impediments to the use of either of the modes of proof specified. All these cases, however, are referable to the general principle, that the party offering documentary evidence must produce the best in his power, or the best which, under the circumstances of the case, he was able to procure. No one can be required to do an impossibility, nor will anyone be deprived of his rights for not producing what is beyond his reach.²

¹ 14 and 15 Vict., c. 99.

² Story, *Conflict of Laws*, § 643; Massé, *Droit Commercial*, tit. ii. §§

§ 36. Perhaps it is not wholly out of place here to make **Slavery** a few remarks on slavery. The slavery of the Middle Ages was not the result of sensuality, as among Mahometans, or of commerce, as in more modern times, but owed its origin to war. It is better known as villenage or prædial slavery, and prevailed in England, as in other European States, throughout the Middle Ages.

Some slaves were called *villeins regardant*; these were annexed to the land and passed with it whenever it changed owners. Others were called *villeins in gross*; these passed from master to master by sale and without regard to any land. But a master could at any time, by separate deed, sever a *villein regardant* from the land and sell him as a *villein in gross*. The lot of a villein was most miserable. His service was uncertain, and its nature and amount was entirely dependent on the caprice of his master. He knew not in the evening what he was to do in the morning, but he was bound to do whatever he was commanded. He might be beaten, imprisoned, or otherwise chastised by his master, save that the latter was punishable for the murder or mayhem of a slave, or for the violation of a neif, or female slave. Any property which the slave might acquire passed to his master. The children of a villein, irrespective of the degree of the mother, were slaves, and if a villein who belonged to one master married a neif belonging to another, the issue of such marriage were equally divided between the two masters.

Froissart (temp. Edward III.) says, 'Un usage est en Angleterre, et aussi est-il en plusieurs pais, que les nobles ont grands franchises sur leur hommes, et les tentent en servage.' By 1 Edw. VI., chap. 3, a vagabond or idle servant was to become a slave to his master. Other English statutes (besides the permissive Colonial Acts) contain references to slavery. Rymer quotes a commission from Queen Elizabeth

336 et seq.; Starkie, *On Evidence*, pt. ii. § 92; Phillips, *On Evidence*, vol. i. p. 432; vol. ii. pp. 133 et seq.; Westlake, *Private Int. Law*, ch. xii.; Gardner, *Institutes*, p. 146; Church v. Hubbart, 2 Cranch R., 238; Henry v. Adey, 3 East R., 221; Andrews v. Herriott, 4 Cowen R., 526, note; Yeaton v. Fry, 5 Cranch R., 335; Thompson v. Stewart, 3 Conn. R., 171; Delafeld v. Hurd, 3 Johns. R., 310; De Sobry v. De Laistre, 2 Harr. and Johns. R., 193; Prichard v. Bailey, 6 Foster's R., 167; Spaulding v. Vincent, 24 Vermont R., 504; Cotton v. Underhill, 4 McLean R., 199; Stewart v. Swanzy, 23 Miss. R., 502; Castrique v. Imrie, C. P. Weekly R. 1860, vol. viii. 344; Barber v. Lamb, *ibid.* 461; General Steam Navigation v. Guillon, 4 M. and W., 894.

in 1574 for inquiring into the lands, tenements, and other goods of all her bondmen and bondwomen in the counties of Cornwall, Devonshire, Somerset, and Gloucester, such as were by blood in a slavish condition, by being born in any of her manors, and to compound with all or any such bondmen or bondwomen for their manumission and freedom.

In the result villenage fell into desuetude and disappeared ; it was never abolished by law. The last case met with is that of *Piggs v. Caley* (Noy. 27) in the fifteenth year of James I. Meanwhile the theory of the law of nature continued extremely active in many directions. Its operations were very conspicuous in constitutional, municipal, and, above all, international law.

The disappearance of villenage is another of the blessings Europe owes to Christianity. In the words of Mr. Ward, the professed and assigned reasons for most of the charters of manumission, from the time of Gregory the Great till the thirteenth century, were religious and pious considerations. Enfranchisement was frequently given upon a death-bed as the most acceptable service that could be offered ; and when the priesthood came to obtain more universal veneration, to assume its functions was the immediate passport to freedom.

But it can scarcely be supposed that slavery was considered inhuman, or was practised with inhumanity, by the early Christians ; for, while their houses were full of slaves, they were ready to lay down their lives or forfeit all worldly goods in support of their religion. Moreover, St. Paul's Epistle to Philemon, to excuse Onesimus, a runaway slave of Philemon, for the act he had committed, contains no suggestion that slavery is in itself contrary to Christianity. Such an occasion would obviously have been one to declare against the practice.

It would seem, therefore, that it is the general tendency of the precepts of Christianity that is contrary to slavery, rather than any particular or positive expression. No distinction is allowed to exist between the bond and the free, all men are declared to be equal. The Saxon laws prohibited, from Christian motives, the sale of Christians out of the country, or to Pagans ; the third Lateran Council in 1179 declared that all Christians ought to be exempt from slavery ;

and King Magnus Ericson of Sweden, in 1335, declared that in future, in his territories, no one born of Christian parents should be or be called a slave.

It was the celebrated Las Casas who, in order to put an end to the sufferings of the Indians in America, obtained permission from the King of Spain to import negro slaves for service in the place of the Indians—a plan which had been put into practice on a small scale so early as the year 1505. This form of slavery thus commenced was for many years of very limited extent. The development of the resources of the New World led to its gradual increase, until a participation in its unhallowed profits was sought with eagerness by most European nations, and the hideous system of slave-trade and slavery in the colonies soon obtained recognition in statutes and ordinances of the mother countries.

In 1553 twenty-four negroes were brought to England from the coast of Africa, and, it would appear from the circumstances, sold in England also.¹ During the reign of Queen Elizabeth, Sir John Hawkins, in a Queen's ship, carried on the slave trade in its worst form.² In the reign of Charles II. the Court of King's Bench decided that negroes, being usually bought and sold among merchants as merchandise, and also being infidels, there might be a property in them sufficient to maintain trover in that court.³ 'I may not forget,' says Evelyn in 1685, 'a resolution which His Majesty made, and had a little before entered upon it at the Council Board at Windsor or Whitehall, that the negroes in the plantations should all be baptised, exceedingly declaiming against that impiety of their masters prohibiting it, out of a mistaken opinion that they would be *ipso facto* free.' He also mentions that on June 19, 1682, the Bantame, or East India Ambassadors, in London, were attended by several slaves.⁴ It is remarkable that the *habeas corpus* Act itself excepted from the benefit of that statute persons who, by contract in writing, had agreed with a merchant or owner of a plantation to be transferred beyond seas and had received earnest on such agreements.

In the reign of Queen Anne the sale of a negro was effected in Cheapside. On motion in arrest of judgment for

¹ *Hakluyt*, vol. i. pt. ii. p. 97.

² *Butts v. Penny*, 2 *Lev.*, 201.

³ Barrow, *Life of Drake*, p. 8.

⁴ Evelyn's *Diary*, p. 157.

the debt, the Court of Queen's Bench held that as soon as a negro comes to England he becomes free, and drew a distinction between a villein and a slave, viz., that the former might exist in England, but not the latter. It must, however, be allowed that this distinction is not very evident. The Court further directed that the declaration should be amended to show that, although the sale was effected in London, the negro at the time of the sale was in Virginia; holding that by the laws of that country negroes were then saleable, for the laws of England did not extend to Virginia, and being a conquered country its law was what the King pleased. The Attorney-General said that slaves were inheritances, and only transferable by deed.¹ In *Smith v. Gould*,² the Court seemed to think that in an action of trespass *quare captivum suum cepit*, the plaintiff might give in evidence that the party was his negro, and he bought him. In the reign of George III., Lord Chancellor Northington, in dismissing a bill filed against a negro who was in England, decided, in contradiction to the historical fact of prædial slavery or villenage in England, that 'as soon as a man sets foot on English ground he is free.' And he added: 'A negro may maintain an action against his master for ill-usage, and may have an *habeas corpus*, if restrained of his liberty.'³

Nine years afterwards Lord Mansfield decided the now well-known case of *Somerset v. Stewart*.⁴ A negro having been bought in Virginia as a slave was brought by his master, an inhabitant of Virginia, to England, and on refusing to return was sent by his master to Captain Knoles's ship, where he was kept in irons, to be carried to Jamaica and sold as a slave. The Court of King's Bench, upon a writ of *habeas corpus*, ordered him to be discharged and set at liberty. Lord Mansfield said: 'The return states that the slave departed and refused to serve, whereupon he was kept to be sold abroad. So high an act of dominion must be recognised by the law of the country where it is used. The power of a master over his slave has been extremely different in different countries. The state of slavery is of such a nature that it is incapable of being introduced on any reason, moral or political, but only by positive law, which preserves its force

¹ *Smith v. Brown*, 2 *Salk.*, 666.

² *Stanley v. Harvey*, 2 *Hagg.*, 116.

³ *Ibid.*

⁴ *Lofft.*, 1.

long after the reasons, occasions, and time itself from whence it was created, are erased from memory. It is so odious that nothing can be suffered to support it but positive law. Whatever inconveniences may follow from this decision, I cannot say this case is allowed or approved by the law of England, and therefore the black must be discharged.' This celebrated decision of Lord Mansfield indirectly contributed not a little to the downfall of the execrable slave-trade and colonial slavery, as it gave a legal sanction to the growing popular opinion on the subject. It has passed into one of the landmarks of the law, and is safe from attack.

Nevertheless, it is to be remarked—1. That Lord Mansfield's reasoning, however absolute, is wanting in precision. He does not grapple in argument with the real difficulty of the case—the existence of the colonial law, and the imperial statutes in favour of colonial slavery. 2. Lord Mansfield, though he had evidently considered it, does not base his judgment on the argument advanced for the slave, that the adoption of *the lex loci* (the extraneous law) would produce intolerable inconveniences—inconsistencies. 3. Lord Mansfield formally rests upon the absence of a positive law directly sanctioning negro slavery in England. There never is any positive law applicable when foreign law is applied ; but here he says the want of a positive law concludes the Court, because slavery 'is so odious that nothing can be suffered to support it but positive law.' In effect he accepts the first argument for the slave, that slavery is contrary to the law of nature and unjust, and should not be allowed. As this argument has nothing local in it, but is universal in its scope, it went far beyond the requirements of the case in hand, and condemned and disallowed the law of slavery in the colonies (so far, at least, as it was customary). Doubtless this was its great merit in the sight of many, and it helped to produce great and good results ; but it is essentially repugnant to modern legal ideas and the conception of the limits of the judicial province. Granted that slavery is odious and unjust ; but if it be the established law of any part of the realm, the duty of the judge is to maintain the law, and the proper remedy, as Lord Stowell points out, is legislation.¹

¹ But is the principle upon which the case of *Somerset* was decided (that by the law of England a slave ceases to be a slave directly he arrives

Since the beginning of this century Great Britain had introduced into several treaties which she concluded stipula-

in England, and thenceforth is in England absolutely and unconditionally free) applicable to the case of a fugitive slave making his escape to a British ship in the territorial waters of a foreign State where slavery is recognised as legal? In the latter case it must be shown that the British ship is in law a portion of her Majesty's dominions, as completely and unconditionally as any part of England itself. But leaving out of consideration the case of a private British ship, a public British ship within the territorial waters of a foreign country can only in a limited sense be said to be part of the territory of Great Britain, as has been before observed, and she is not so completely part of such territory that a slave stepping on her deck becomes free. Such a ship, in such circumstances, is exempt from any other jurisdiction than that of the State to which she belongs, upon considerations of public comity and convenience, and by reason of a presumed consent of nations, that foreign public ships coming into their ports shall, so long as they demean themselves according to law and in a friendly manner, be exempt from local jurisdiction. Chief Justice Best, in the course of a very strong anti-slavery judgment, says:— 'The moment they (the slaves) put their feet on board of a British man-of-war, not lying within the waters of East Florida, where undoubtedly the laws of that country would prevail, those persons, who before had been slaves, were free.' (Forbes *v.* Cochrane, 3 *D. and R.*, 679.) The learned judge evidently was of opinion that a slave escaping to a man-of-war lying in the territorial waters of a slave State would retain his status of slavery. This was in 1815, and the special case states 'that Sir George Cockburn sailed in the "Albion" with the said Spanish slaves from East Florida, at which time he received intelligence of peace between England and America, and such slaves as belonged to American subjects, and were in possession of the defendants (British officers), *were not taken away*, in consequence of the wording of the treaty of peace.' This was in consequence of the Treaty of Ghent (*Hertslet*, ii. 394). The slaves who had come from plantations in the United States on board, as the above case shows, one (at least) of his Majesty's ships, were given up. See also *Madrazo v. Willes*, 3 *Barn. and Ald.*, 353; *Williams v. Brown*, 3 *Bos. and Pull.*, 69.

With regard to British ships, whether public or private, on the high seas, their decks are considered part of the British territory, and if a slave gets on board a ship upon the high seas there can be no doubt but that he becomes *ipso facto* free. But Lord Stowell, in the case of the slave Grace (*R. v. Allan*, 2 *Hagg. Adm. R.*, 94), decided that if the slave who has become free by coming to England finds his way back to the State in which he was in slavery, his status of slavery revives. This decision does not appear to have been ever overruled. Jack Martin, a slave, ran away from Antigua, and entered on board H.M.S. 'Cygnet.' Whilst that vessel was in the roadstead of Antigua, the slave was taken out of it with consent of the commander, who gave him up, and he was returned to his owner. In January, 1826, he was seized by an officer of the Customs (as a slave illegally imported), and proceedings were instituted against the owners on an information in the same terms and to the same effect as in other cases. The Vice-Admiralty Court had pronounced in favour of the owners, and Lord Stowell affirmed the sentence. (*Ann. Reg.*, 1827, p. 355.)

By the Addenda of 1880 to the Queen's Regulations and Admiralty Instructions of 1879, the following Article with regard to fugitive slaves is to be considered part of the Slave Trade instructions, in lieu of the Circular dated December 5, 1875, and is to be considered as addressed

tions in favour of the abolition of this traffic, but it was not until the Treaty of Paris, May 30, 1814, that the philanthropic principles which she desired to cause to enter into the policy of the various Great Powers took a tangible form.

At the Congress of Vienna, 1815, of Aix-la-Chapelle, 1818, and Verona, 1822, the Powers therein assembled practically adopted the principle of abolition. The Treaty of London, ratified February 19, 1842, contains similar principles.

It has, however, been questioned whether, in the interest of the American colonies, it might not have been sufficient and wiser for the Powers to have limited themselves to regulating the traffic, correcting its inhumanity, and ameliorating the condition of the slaves.

Great Britain abolished slavery in her colonies by the 3 and 4 Will. IV., c. 73, in 1833; but, however philanthropic and humane a measure in the abstract, it was a practical

to, and as intended for, the guidance of commanding officers of her Majesty's ships generally :—

Art. 22.—1. 'In any case in which you have received a fugitive slave into your ship and taken him under the protection of the British flag, whether within or beyond the territorial waters of any State, you will not admit or entertain any demand made upon you for his surrender on the ground of slavery.'

2. 'It is not intended, nor is it possible, to lay down any precise or general rule as to the cases in which you ought to receive a fugitive slave on board your ship. You are, as to this, to be guided by considerations of humanity, and these considerations must have full effect given to them, whether your ship is on the high seas or within the territorial waters of a State in which slavery exists; but in the latter case you ought, at the same time, to avoid conduct which may appear to be in breach of international comity and good faith.'

3. 'If any person, within territorial waters, claims your protection on the ground that he is kept in slavery contrary to treaties with Great Britain, you should receive him until the truth of his statement is examined into. This examination should be made, if possible, after communication with the nearest British Consular authority, and you should be guided in your subsequent proceedings by the result.'

4. 'A special report is to be made of every case of a fugitive slave received on board your ship.'

Don Felix de Azara, writing in 1809, relates that about twenty years before, an English female-slave, with her daughters, made her escape, and took refuge on a Spanish island of the Antilles. Her master claimed her. She offered to purchase her liberty of him, but he refused. The Spanish Governor thereupon, notwithstanding the treaty of peace, which required her extradition, refused to give her up. A representation of the matter being addressed to the Spanish Government, the action of the governor was approved of, and it was decided that no slaves should be given up. This humane order was afterwards revoked at the solicitation of the Portuguese. (*Voyages dans l'Amérique Méridionale*, tom. ii. p. 271.)

failure ; for, while it reduced many British colonists to absolute beggary, it largely stimulated the foreign plantations and the foreign slave-trade.

Slavery was abolished in the United States in 1865. Notwithstanding the abolition of slavery by Great Britain and by the United States, it has been held in the Courts of both countries that the slave-trade is not against the law of nations, although it is against the municipal laws of their own and other countries. Moreover, the same Courts hold that the slave-trade is not piracy, except where made so by the laws of individual nations, and then only as far as regards the subjects of that nation.¹

¹ *English Cases*, the 'Louis,' 2 *Dods.*, 210 ; *Madrago v. Willes*, 3 *Barn and Ald.*, 353 ; *Buron v. Denman*, 2 *Exch.*, 167 ; *Santos v. Illidge*, 28 *L.J.*, C. P., 317, and in error 29 *L.J.*, *Exch. Ch.*, 348. *American Cases*, 'La Jeune Eugénie,' 2 *Mason*, 419, overruled by 'The Antelope,' 10 *Wheat.*, 66 ; see also *post.*, ch. xxvii. § 9.

A law for the abolition of slavery in the island of Cuba was sanctioned by Spain, February 13, 1880.

The following is a list of the principal treaties for the suppression of the traffic in negro slaves, made between Great Britain and foreign States :—

- 1810. February 19, Portugal.
- 1814. January 14, Denmark ; May 30, France ; August 28, Spain.
- 1815. January 22, Portugal ; February 8, Declaration of the Congress of Vienna.
- 1817. July 28, Portugal ; September 23, Spain ; November 23, Madagascar.
- 1818. May 4, Netherlands.
- 1820. October 11, Madagascar (additional).
- 1822. November 28, Declaration signed at the Congress of Verona ; December 10, Treaty with Spain (supplementary article to the treaty of September 23, 1817) ; December 31, the Netherlands (additional article to the treaty of May 4, 1818).
- 1823. January 25, the Netherlands ; May 31, Madagascar (additional).
- 1824. November 6, Sweden and Norway.
- 1825. February, Buenos Ayres or Rio de la Plata ; February 26, Sweden and Norway ; April 18, Columbia (since divided into three Republics—New Granada, Ecuador, and Venezuela).
- 1826. October 2, Portugal ; November 23, Brazil ; December 26, Mexico.
- 1831. November 30, France.
- 1833. March 22, France.
- 1834. July 26, Denmark (the accession to the conventions of 1831 and 1833) ; August 8, Sardinia (ditto) ; December 8, ditto (additional article to the treaty of August 8).
- 1835. June 15, Sweden and Norway ; June 28, Spain.
- 1837. February 7, the Netherlands ; June 5, the Confederation of Peru ; Bolivia ; June 9, the Hanseatic Towns (accession to the convention of 1831 and 1833) ; November 24, Tuscany (ditto).
- 1838. February 14, Two Sicilies (ditto).
- 1839. January 19, Treaty with Chili ; March 15, Uruguay ; March 15, Venezuela ; May 24, Argentine ; July 13, Uruguay (ratified January 21,

1842); December 17, Muscat; December 23, Hayti (accessions to the conventions of 1831 and 1833).

1840. September 25, Bolivia; December 16, Texas.

1841. February 24, Mexico; May 24, Ecuador; August 7, Bolivia; Chili (additional); December 20 (ratified February 19, 1842), Austria, France, Prussia, and Russia.

(A Convention between Great Britain and Germany was entered into March 29, 1879, extending to the German Empire the provisions of this treaty.)

1842. February 19 (see December 20, 1841); April 13, Mexico (additional); July 3, Portugal; August 9, the United States.

1844. November 8, Johanna.

1845. May 29, France; October 2, Muscat; Zanzibar.

1846. January 15, Ecuador (additional); with chiefs of Cape Mount, Africa.

1847. May 27, Borneo; with various Arab chiefs of the Persian Gulf, with Rio Nunez, Cagnabac, Manna, Bolola, Little Booton, Grand Sesters, Garraway River, and others.

1848. February 24, Belgium; August 31, the Netherlands (additional); November 21, Liberia.

1850. May 6, Zanzibar.

1851. April 2, New Granada; August 2, Persia.

1852. January 13, Dahomey.

1853. February 2, Zanga Tanga and Cape Lopez.

1854. September 16, Mohilla; September 20, Comoro.

1857. March 4, Persia.

1862. April 7, United States.

1863. February 17, additional articles with ditto.

1865. June 27, Madagascar.

1870. June 3, United States (additional convention).

1871. June 18, Portugal (additional convention).

1873. June 5, Zanzibar.

1877. May 12, Dahomey; August 4, Egypt (convention).

The following treaties have been ratified by Great Britain with slave States, viz. :—

Treaty with Tripoli, October 18, 1662 (1 *Hertslet's Com. Treat.*, 127).

Ditto, 1675-6 (ditto, 131).

Ditto, 1716 (ditto, 141).

Ditto, 1751 (ditto, 147).

Treaty with Tunis, 1716 (ditto, 163).

Ditto, 1751 (ditto, 169).

They all contain a stipulation, of which the following are examples, and *by virtue of which* a slave may become free. Thus by Art. 11 of the Treaty between Great Britain and Tripoli, 1675-76, it is declared that 'when any of his Majesty's ships of war shall appear before Tripoli, upon notice thereof given by the English Consul, or by the commander of the said ships, to the chief Governor of Tripoli, public proclamation shall be immediately made to secure the Christian captives, and if, after that, any Christians whatever make their escape on board any of the said ships of war, *they shall not be required* back again, nor shall the said Consuls or commanders of any of his said Majesty's subjects be obliged to pay anything for the said Christians.'

Again, by the Treaty of 1751 between Great Britain and Tunis it is declared that, if any slave of Tunis shall make his escape from thence, and get on board an English man-of-war, *the said slave shall be free*, and neither the English Consul nor any of his nation shall in any manner be questioned about the same.

Elliot's *Diplomatic Code* contains treaties between the United States

and slave States. By the Treaty of 1786 between the United States and the Emperor of Morocco it is declared that 'if any ship of war belonging to the United States shall put into any of our ports, *she shall not be examined* on any pretence whatever, even though she should have any fugitive slaves on board, nor shall the Governor or commander of the place compel them to be brought on shore on any pretext whatever.' And by the Treaty of 1815, between the United States and the Dey of Algiers, it is further declared that 'on a vessel or vessels of war belonging to the United States anchoring before the city of Algiers, the Consul is to inform the Dey of her arrival, when she shall receive the salutes which are by treaty or custom given to the ships of the most favoured nations on similar occasions, and which shall be returned gun for gun : and if, after such arrival so announced, any Christians whatsoever, captives in Algiers, make their escape and take refuge on board any of the ships of war, *they shall not be required back again*, nor shall the Consuls of the United States or commanders of the said ships be required to pay anything for the said Christians.'

Slavery was abolished in Madagascar, by a decree of the Queen of that dominion, in 1877.

In 1865 the Spanish Government denounced the slave trade as piracy, and in 1880 sanctioned a law for the abolition of slavery in the island of Cuba.

By the General Act of the Berlin Conference, 1885, Great Britain, Germany, Austria, Belgium, Denmark, Spain, the United States (not yet ratified), France, Italy, the Netherlands, Portugal, Russia, Sweden and Norway, and Turkey declared (Art. IX.), 'Seeing that trading in slaves is forbidden in conformity with the principles of International Law as recognised by the Signatory Powers, and seeing also that the operations which by sea or land furnish slaves to trade, ought likewise to be regarded as forbidden, the Powers which do or shall exercise sovereign rights or influence in the territories forming the Conventional basin of the Congo, declare that these territories may not serve as a market or means of transit for the trade in slaves, of whatever race they may be. Each of the Powers binds itself to employ all the means at its disposal for putting an end to this trade, and for punishing those who engage in it.'

By the General Act of July 2, 1890, of the Brussels Conference, 1889-90, Germany, Austria, Belgium, Denmark, Spain, the Congo, the United States of America, France, Great Britain, Italy, Netherlands, Persia, Portugal, Russia, Sweden, and Turkey declared the most effective means in their opinion for counteracting the slave trade in the interior of Africa, concerted measures to be taken in the places of origin of slavery, as well with regard to caravan-routes as to the land-transport of slaves, and passed regulations concerning the use of the flag and supervision by cruisers, and the stopping of suspected vessels. This Act has been ratified by the Signatory Powers.

APPENDIX

TREATIES OF EXTRADITION

TREATIES or conventions of extradition have now been concluded between most civilised States. The following is a list of the more important treaties or conventions :—

AUSTRIA and **AUSTRIA-HUNGARY** with Baden, 1829 ; Belgium, 1853, 1857, and 1872 ; France, 1855 and 1869 ; Germany, 1854 ; Great Britain, 1873 ; Greece, 1874 ; Italy, 1869 and 1871 ; Montenegro, 1872 ; Netherlands, 1852 ; Russia, 1874 ; Spain, 1861 ; Sweden and Norway, 1868 ; Switzerland, 1828, 1855 ; United States, 1856.

BELGIUM with Austria, 1853, 1857, and 1872 ; Brazils, 1873 ; Denmark, 1876 ; France, 1874 ; Germany, 1874 ; Great Britain, 1872, 1876, and 1877 ; Italy, 1875 ; Luxemburg, 1872 ; Monaco, 1874 ; Netherlands, 1877 ; Peru, 1874 ; Portugal, 1854 ; Prussia, 1836 ; Russia, 1872 ; Spain, 1876 ; Sweden and Norway, 1870 ; Switzerland, 1846 and 1874 ; United States, 1874.

BRAZILS with Great Britain, 1872 and 1873 ; Italy, 1872.

COSTA RICA with Italy, 1873.

DENMARK with France, 1877 ; Great Britain, 1862 and 1873 ; Italy, 1873 ; Netherlands, 1851 and 1877 ; Prussia, 1820 ; Russia, 1866 ; Spain, 1767 ; Sweden and Norway, 1823.

ECUADOR with United States, 1872.

FRANCE with Austria, 1855 and 1869 ; Belgium, 1834 ; Chili, 1860 ; Columbia, 1850 ; Germany, 1845 and 1871 ; Great Britain, 1876 ; Italy, 1870 and 1873 ; Luxemburg, 1875 ; Monaco, 1876 ; Netherlands, 1844 and 1860 ; Peru, 1874 ; Portugal, 1854 and 1872 ; Spain, 1765, 1850, 1859, 1867, and 1877 ; Sweden, 1843 and 1869 ; Switzerland, 1828 and 1869 ; United States, 1843, 1845, and 1858 ; West Indies, 1866 ; Würtemberg, 1765.

GERMANY with Austria, 1854 ; Belgium, 1870 and 1874 ; Great Britain, 1872 ; Italy, 1871 (extended in October, 1873, to pass prisoners through Switzerland) and 1873 ; Luxemburg, 1876 ; Netherlands, 1818, 1850, 1853, and 1867 ; Spain, 1860 and 1878 ; Switzerland, 1874 ; United States, 1852 and 1868.

GREAT BRITAIN with Austria, 1873 ; Belgium, 1872, 1876, and 1877 ; Brazil, 1872 and 1873 ; Burmah, 1867 ; Columbia, 1889 ; Denmark, 1862 and 1873 ; Ecuador, 1880 ; France, 1876 ; Germany, 1872 ; Guatemala, 1885 ; Hayti, 1874 ; Holland, 1874 ; Honduras, 1874 ; Italy, 1873 ; Luxemburg, 1880 ; Mexico, 1889 ; Netherlands, 1881 ; Orange Free State, 1891 ; Russia, 1886 ; Salvador, 1881 ; Siam, 1869 ; Spain, 1878 and 1889 ; Sweden and Norway, 1873 ; Switzerland, 1880 ; Tonga, 1879 ; Tunis, 1889 ; United States, 1842 and 1889 ; Uruguay, 1884.¹

GREECE with Austria-Hungary, 1874 ; Italy, 1877.

ITALY with Austria-Hungary, 1869 and 1871 ; Great Britain, 1873 ; Greece, 1877 ; Mexico, 1870 ; Portugal, 1878 ; Russia, 1871 and 1876 ; Salvador, 1871 ; Spain, 1857 and 1868 ; Sweden and Norway, 1866 ; Switzerland, 1868 and 1873 ; United States, 1868.

NETHERLANDS with Austria, 1852 ; Italy, 1869 ; Luxemburg, 1877 ; Monaco, 1876 ; Orange Free State, 1874 ; Portugal, 1854 and 1878 ; Prussia, 1850 ; Russia, 1867 ; Spain, 1860 ; Sweden and Norway, 1854 ; Switzerland, 1853 ; United States, 1874.

PORTUGAL with Italy, 1878 ; Netherlands, 1854 and 1878 ; Spain,

¹ See also section 17 of General Extradition Act, 1873.

1823, 1867, 1868, and 1873; Sweden and Norway, 1863; Switzerland, 1873; Uruguay, 1878.

RUSSIA with Austria-Hungary, 1874; Belgium, 1872; Denmark, 1866; Prussia, 1844; Spain, 1877; Switzerland, 1873.

SPAIN with Austria, 1861; Brazils, 1870; Great Britain, 1878; Monaco, 1859; Portugal, 1823, 1867, 1868, and 1873; Prussia, 1860; Russia, 1877; United States, 1877.

SWEDEN AND NORWAY with Austria, 1868; Belgium, 1870; Denmark, 1823; France, 1843; Great Britain, 1873; Netherlands, 1854; United States, 1866.

SWITZERLAND with Austria, 1828 and 1855; Belgium, 1846 and 1874; France, 1828 and 1869; Germany, 1874; Great Britain, 1874 and 1880; Italy, 1868 and 1873; Luxemburg, 1876; Netherlands, 1853; Russia, 1873; United States, 1850.

UNITED STATES with Austria, 1856; Baden, 1857; Bavaria, 1853; Belgium, 1874; Dominican Republic, 1867; Ecuador, 1872; France, 1843 and 1845; Germany, 1868; Great Britain, 1842; Hanover, 1855; Hawaiian Isles, 1849; Hayti, 1864; Italy, 1868 and 1869; Mexico, 1861; Netherlands, 1874; Nicaragua, 1870; Orange Free State, 1873; Peru, 1870; Salvador, 1874; Spain, 1877; Sweden and Norway, 1866; Switzerland, 1850; Turkey, 1874; Venezuela, 1861.

Moreover, local arrangements for the extradition of criminals have been made between British colonies and adjacent countries—viz., between

The West India Islands and Venezuela; Labuan and Borneo; British Honduras and Guatemala; Hong Kong and China; Malta and Italy; Canada and the United States; Hong Kong and Macao.

By the Hong Kong Ordinance, No. 2, of 1850, where it appears to a magistrate or court that there is probable cause for believing that a Chinese, who has taken refuge at Hong Kong, has committed 'any crime or offence against the laws of China,' he may be imprisoned with a view to his being surrendered to the Government of China.

It was held by the Privy Council on appeal from the Supreme Court of Hong Kong that the words 'crime or offence' must be limited to those ordinary crimes and offences which are punishable by the laws of all nations, and which are not peculiar to the laws of China, such as murder, robbery, theft, or arson committed by a Chinese within Chinese territory or in Chinese ships on the high seas; piracy, moreover, in certain circumstances would come within the Ordinance, as, for example, if a Chinese went from the Chinese coasts to plunder ships at sea, returning again to China with his plunder. Where a Chinese, who had taken refuge in Hong Kong, was accused of having previously murdered a French captain of a French ship at sea, it was held that he could not be imprisoned and delivered up to the Chinese Government under the Ordinance, on two grounds—(1) That it could not be assumed without evidence that there was any law in China to punish a Chinese subject for murder committed upon a foreigner within foreign territory, and (2) That even if it could be assumed, still the offence, having been committed within French territory, ought to be treated as an offence against French, and not an offence against Chinese law.

Chinese coolies who were being taken from China to Peru in a French ship killed the captain and several of the French crew, and then took the ship back to China. They were held to have been guilty of piracy *jure gentium*. But the piracy was held not to be an offence against the law of China within the meaning of the Ordinance; if they committed an act against the municipal law of any nation it was against that of France: and if they were punishable by the law of China it was only because they had committed an act of piracy which *jure gentium* is justiciable everywhere. (*Attorney-General of Hong Kong v. Kwok-a-sing*, 5 L. R. (P.C.) 179.)

THE EXTRADITION ACTS

THE following is the General Extradition Act of Great Britain :—33 and 34 Vict., c. 52, 'An Act for amending the law relating to the extradition of criminals.'

1. This Act may be cited as the Extradition Act, 1870.

2. Where an arrangement has been made with any foreign State with respect to the surrender of such State of any fugitive criminals, her Majesty may, by order in Council, direct that this Act shall apply in the case of such foreign State. Her Majesty may, by the same or any subsequent order, limit the operation of the order, and restrict the same to fugitive criminals who are in, or suspected of being in, the part of her Majesty's dominions specified in the order, and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient. Every such order shall recite or embody the terms of the arrangement, and shall not remain in force for any longer period than the arrangement. Every such order shall be laid before both Houses of Parliament either six weeks after it is made, or, if Parliament be not then sitting, within six weeks after the then next meeting of Parliament, and shall also be published in the *London Gazette*.¹

3. The following restrictions shall be observed with respect to the surrender of fugitive criminals :—

(1) A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on *habeas corpus*, or to the Secretary of State, that the requisition for his surrender has, in fact, been made with a view to try or punish him for an offence of a political character.²

(2) A fugitive criminal shall not be surrendered to a foreign State unless provision is made by the law of that State, or by arrangement that the fugitive criminal shall not, until he has been restored, or had an opportunity of returning to her Majesty's dominions, be detained or tried in that foreign State for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded.

(3) A fugitive criminal who has been accused of some offence within English jurisdiction, not being the offence for which his surrender is asked, or is undergoing sentence under any conviction in the United Kingdom, shall not be surrendered until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise.

(4) A fugitive criminal shall not be surrendered until the expiration

¹ An order in Council of February 4, 1875, embodied the extradition treaty with Switzerland, which contained the clause following : 'No Swiss subject shall be delivered up by Switzerland to the Government of the United Kingdom, and no subject of the United Kingdom shall be delivered up by the Government thereof to Switzerland.' It was held by the Court of Queen's Bench that the treaty with the condition that no English subject should be surrendered to Switzerland was given effect to in the manner required by the Act, and that the prisoner, an English subject, who had committed larceny in Switzerland, could not be surrendered. (Re *Wilson*, 3 Q.B.D., 42 ; 26 W. R., 44.)

In 1845 the United States rejected a treaty with Prussia because the latter insisted that neither Power should be required to give up its own subjects ; but this was waived by the former in 1852.

² Treaties of extradition where Great Britain has been a party have never included political offenders or slaves. Indeed, slaves have been expressly excepted. (See 15 and 16 Vict., c. 26.)

of fifteen days from the date of his being committed to prison to await his surrender.

4. An order in Council for applying this Act in the case of any foreign State shall not be made unless the arrangement (1) provides for the determination of it by either party to it after the expiration of a notice not exceeding one year, and (2) is in conformity with the provisions of this Act, and in particular with the restrictions on the surrender of fugitive criminals contained in this Act.

5. When an order applying this Act in the case of any foreign State has been published in the *London Gazette*, this Act (after the date specified in the order, or if no date is specified after the date of the publication) shall, so long as the order remains in force, but subject to the limitations, restrictions, conditions, exceptions, and qualifications, if any, contained in the order, apply in the case of such foreign State. An order in Council shall be conclusive evidence that the arrangement therein referred to complies with the requisitions of this Act, and that this Act applies in the case of the foreign State mentioned in the order, and the validity of such order shall not be questioned in any legal proceedings whatever.

6. Where this Act applies in the case of any foreign State, every fugitive criminal of that State who is in, or suspected of being in, any part of her Majesty's dominions, or that part which is specified in the order applying this Act (as the case may be), shall be liable to be apprehended or surrendered in manner provided by this Act, whether the crime in respect of which the surrender is sought was committed before or after the date of the order, and whether there is or is not any concurrent jurisdiction in any court of her Majesty's dominions over that crime.

7. A requisition for the surrender of a fugitive criminal of any foreign State who is in, or suspected of being in, the United Kingdom shall be made to a Secretary of State by some person recognised by the Secretary of State as a diplomatic representative of that foreign State. A Secretary of State may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal.

If the Secretary of State is of opinion that the offence is one of a political character, he may, if he thinks fit, refuse to send any such order, and may also at any time order a fugitive criminal accused or convicted of such offence to be discharged from custody.

8. A warrant for the apprehension of a fugitive criminal, whether accused or convicted of crime, who is in, or suspected of being in, the United Kingdom, may be issued :—

(1) By a police magistrate on the receipt of the said order of the Secretary of State, and on such evidence as would in his opinion justify the issue of the warrant if the crime had been committed, or the criminal convicted, in England ; and

(2) By a police magistrate or any justice of the peace in any part of the United Kingdom, on such information or complaint, and such evidence or after such proceedings as would, in the opinion of the person issuing the warrant, justify the issue of a warrant if the crime had been committed or the criminal convicted in that part of the United Kingdom in which he exercises jurisdiction.

Any person issuing a warrant under this section without an order from a Secretary of State shall forthwith send a report of the fact of such issue, together with the evidence and information or complaint, or certified copies thereof, to a Secretary of State, who may, if he think fit, order the warrant to be cancelled, and the person who has been apprehended on the warrant to be discharged.

A fugitive criminal, when apprehended on a warrant issued without the order of a Secretary of State, shall be brought before some person having

power to issue a warrant under this section, who shall by warrant order him to be brought, and the prisoner shall accordingly be brought, before a police magistrate.

A fugitive criminal, apprehended on a warrant issued without the order of the Secretary of State, shall be discharged by a police magistrate, unless the police magistrate, within such reasonable time as with reference to the circumstances of the case he may fix, receives from a Secretary of State an order signifying that a requisition has been made for the surrender of such criminal.

9. When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner and have the same jurisdiction and powers as near as may be as if the prisoner were brought before him charged with an indictable offence committed in England. The police magistrate shall receive any evidence which may be tendered to show that the crime, of which the prisoner is accused or alleged to have been convicted, is an offence of a political character, or is not an extradition crime.

10. In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

In the case of a fugitive criminal alleged to have been convicted of an extradition crime, if such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, prove that the prisoner was convicted of such crime, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged. If he commits such criminal to prison, he shall commit him to the Middlesex House of Detention, or to some other prison in Middlesex, there to await the warrant of a Secretary of State for his surrender, and shall forthwith send to a Secretary of State a certificate of the committal, and such report upon the case as he may think fit.

11. If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*.

Upon the expiration of the said fifteen days, or if a writ of *habeas corpus* is issued after the decision of the Court upon the return to the writ, as the case may be, or after such further period as may be allowed in either case by a Secretary of State, it shall be lawful for a Secretary of State, by warrant under his hand and seal, to order the fugitive criminal (if not delivered on the decision of the Court) to be surrendered to such person as may, in his opinion, be duly authorised to receive the fugitive criminal by the foreign State from which the requisition for the surrender proceeded, and such fugitive criminal shall be surrendered accordingly.

It shall be lawful for any person to whom such warrant is directed, and for the person so authorised as aforesaid, to receive, hold in custody, and convey within the jurisdiction of such foreign State, the criminal mentioned in the warrant; and if the criminal escapes out of any custody to which he may be delivered on, or in pursuance of such warrant, it shall be lawful to retake him in the same manner as any person accused of any crime against the laws of that part of her Majesty's dominions to which he escapes may be retaken upon an escape.

12. If the fugitive criminal who has been committed to prison is not surrendered and conveyed out of the United Kingdom within two months after such committal, or if a writ of *habeas corpus* is issued after the de-

cision of the Court upon the return to the writ, it shall be lawful for any judge of one of her Majesty's superior Courts at Westminster, upon application made to him by or on behalf of the criminal, and upon proof that reasonable notice of the intention to make such application has been given to a Secretary of State, to order the criminal to be discharged out of custody, unless sufficient cause is shown to the contrary.

13. The warrant of the police magistrate issued in pursuance of this Act may be executed, in any part of the United Kingdom, in the same manner as if the same had been originally issued or subsequently endorsed by a Justice of the Peace having jurisdiction in the place where the same is executed.

14. Depositions or statements on oath taken in a foreign State, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Act.¹

15. Foreign warrants and depositions, or statements on oath and copies thereof, and certificates of, or judicial documents stating the fact of, a conviction, shall be deemed duly authenticated for the purpose of this Act, if authenticated in manner provided for the time being by law, or authenticated as follows:—

(1) If the warrant purports to be signed by a judge, magistrate, or officer of the foreign State where the same was issued.

(2) If the depositions or statements or the copies thereof purport to be certified under the hand of a judge, magistrate, or officer of the foreign State, where the same were taken, to be the original depositions or statements, or to be true copies thereof, as the case may require; and

(3) If the certificate of, or judicial document stating the fact of, conviction purports to be certified by a judge, magistrate, or officer of the foreign State where the conviction took place; and if in every case the warrants, depositions, statements, copies, certificates, and judicial documents (as the case may be) are authenticated by the oath of some witness, or by being sealed with the official seal of the Minister of Justice, or some other Minister of State; and all Courts of justice, justices, and magistrates shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof.

16. Where the crime, in respect of which the surrender of a fugitive criminal is sought, was committed on board any vessel on the high seas which comes into any port of the United Kingdom, the following provisions shall have effect:—

(1) This Act shall be construed as if any stipendiary magistrate in England or Ireland and any sheriff or sheriff's substitute in Scotland were substituted for the police magistrate throughout this Act, except the part relating to the execution of the warrant of the police magistrate.

(2) The criminal may be committed to any prison to which the person committing him has power to commit persons accused of the like crime.

(3) If the fugitive criminal is apprehended on a warrant issued without the order of the Secretary of State, he shall be brought

¹ Depositions duly authenticated are admissible in proceedings under the Act, though not taken in the presence of the accused nor on the particular charge. Conditions not required by that Act, but required by a treaty before initiating proceedings under the Act, cannot be taken into account in considering the validity of proceedings under the Act, if the magistrate in other respects had jurisdiction. (*Re Counhaye*, 8 *L.R.* (Q.B.), 410, 1873; *re Terraz*, 48 *L.J.*, Exch., 214.)

before the stipendiary magistrate, sheriff, or sheriff's substitute who issued the warrant, or who has jurisdiction in the port where the vessel lies, or in the place nearest to that port.

17. This Act, when applied by order in council,¹ shall, unless it is otherwise provided by such order, extend to every British possession in the same manner as if throughout this Act the British possessions were substituted for the United Kingdom or England, as the case may require, but with the following modifications, namely:—

(1) The requisition for the surrender of a fugitive criminal who is in, or suspected of being in, a British possession, may be made to the governor of that British possession by any person recognised by that governor as a consul-general, consul, or vice-consul, or (if the fugitive criminal has escaped from a colony or dependency of the foreign State on behalf of which the requisition is made) as the governor of such colony or dependency.

(2) No warrant of a Secretary of State shall be required, and all powers vested in or acts authorised or required to be done under this Act by the police magistrate and the Secretary of State, or either of them, in relation to the surrender of a fugitive criminal, may be done by the governor of the British possession alone.

(3) Any prison in the British possession may be substituted for a prison in Middlesex.

(4) A judge of any court exercising in the British possession the like powers as the Court of Queen's Bench exercises in England may exercise the power of discharging a criminal, when not conveyed within two months out of such British possession.

18. If by any law or ordinance made before or after the passing of this Act by the legislature of any British possession, provision is made for carrying into effect, within such possession, the surrender of fugitive criminals who are in, or suspected of being in, such British possession, her Majesty may, by the order in council applying this Act in the case of any foreign State or by any subsequent order, either suspend the operation within any such British possession of this Act or of any part thereof, so far as it relates to such foreign State, and so long as such law or ordinance continues in force there, and no longer; or direct that such law or ordinance, or any part thereof, shall have effect in such British possession, with or without modifications and alterations, as if it were part of this Act.

19. Where, in pursuance of any arrangements with a foreign State, any person accused or convicted of any crime which, if committed in England, would be one of the crimes described in the first schedule to this Act, is surrendered by that foreign State, such person shall not until he has been restored, or had an opportunity of returning to such foreign State, be triable or tried for an offence committed prior to the surrender in any part of her Majesty's dominions other than such of the said crimes as may be proved by the facts on which the surrender is grounded.²

¹ Orders in Council have been applied to the following British possessions:—Australia (Western), Australia (South), Bahamas, Barbadoes, Cape of Good Hope, Ceylon, Gibraltar, Gold Coast, Honduras (British), Hong Kong, Jamaica, Leeward Islands, Malta, Mauritius, Natal, Queensland, St. Lucia, Sierra Leone, Straits Settlements, Tasmania, Trinidad, and Victoria.

By section 36 of the 44 and 45 Vict., c. 69, an Act to amend the law with respect to fugitive offenders in British dominions, the Queen may, by order in council, direct that it (the said Act) shall apply as if, subject to the conditions, exceptions, and qualifications (if any) contained in the order, *any place out of her Majesty's dominions in which her Majesty has jurisdiction*, and which is named in the order, were a British possession.

² It was decided by the Circuit Court of the City of New York that the extradition treaty of 1842 between England and the United States does not pro-

20. The forms set forth in the second schedule to this Act, or forms as near thereto as circumstances admit, may be used in all matters to which such forms refer, and in the case of a British possession may be so used, *mutatis mutandis*, and when used shall be deemed to be valid and sufficient in law.

21. Her Majesty may by order in council revoke or alter, subject to the restrictions of this Act, any order in council made in pursuance of this Act, and all the provisions of this Act with respect to the original order shall (so far as applicable) apply, *mutatis mutandis*, to any such new order.

22. This Act (except so far as relates to the execution of warrants in the Channel Islands) shall extend to the Channel Islands and the Isle of Man in the same manner as if they were part of the United Kingdom, and the royal courts of the Channel Islands are hereby respectively authorised and required to register this Act.

23. Nothing in this Act shall affect the lawful powers of her Majesty, or of the Governor-General of India in Council, to make treaties for the extradition of criminals with Indian native States, or with other Asiatic States conterminous with British India, or to carry into execution the provisions of any such treaties made either before or after passing this Act.

24. The testimony of any witness may be obtained in relation to any criminal matter pending in any Court or tribunal in a foreign State, in like manner as it may be obtained in relation to any civil matter under the Act of the session of the nineteenth and twentieth years of the reign of her present Majesty, ch. 113, intituled, 'An Act to provide for taking evidence in her Majesty's dominions in relation to civil and commercial matters pending before foreign tribunals,' and all the provisions of that Act shall

vide that a person extradited shall not be tried for an offence other than that for which he is extradited. The statutes of the United States passed in 1848 and 1869 in relation to extradited criminals do not give such a construction to the treaty. If the English statute of 1870 is held in England to give such a construction to the treaty (which the Court doubted), yet that statute cannot be held to have had that effect in the United States, nor can that statute be held to have been such a modification of the treaty of 1842 that the failure of the Government of the United States thereupon, to give notice of the abrogation of the treaty, can be held to have been an assent by that Government to such modification. Nor can an agreement entered into between the representatives of the two Governments in any case before the extradition, as to the offences for which an extradited person should be tried, have the effect of depriving the Court of jurisdiction to try him for other offences. The effect of such an agreement is a question for the executive, and not the judicial department of the Government. (The United States *v. Lawrence*, *Mar. term*, 1876.) See also Heilbronn case, 12 *New York Legal Obs.*, 65; Caldwell's case, 8 *Blatchf. R.*, 131; Adriance *v. Logrove*, 59 *New York R.*, 115; Bouvier's case, 27 *L. T.*, 844; 42 *L. J.*, Q.B., 17; Scott's case, 9 *B. and C.*, 447.

In the case of Winslow and Brent, American subjects, whose extradition was asked by the United States in 1876, the British Government required the United States Government to pledge themselves that the prisoners should be tried upon no other charge save on that one for which they were to be extradited. On the refusal of the United States to do so, the prisoners were discharged from custody. Fears were entertained that all extradition would cease between the two countries. The matter was argued in the House of Lords, and Lord Selborne declared himself in favour of the view adopted by the United States, for the question was governed by the treaty of 1842, and there was no reason why an extradited person should not be tried for an offence other than that for which he had been extradited, political offenders excepted. The Act of 1870 contained words to prevent this, but no Act of Parliament could introduce into a treaty a condition that it did not contain. Eventually the British Government acquiesced in this view, and Brent was re-arrested and extradited to the United States.

be construed as if the term 'civil matter' included a criminal matter, and the term 'cause' included a proceeding against a criminal, provided that nothing in this section shall apply in the case of any criminal matter of a political character.

25. For the purposes of this Act, every colony, dependency, and constituent part of a foreign State, and every vessel of that State, shall (except where expressly mentioned as distinct in this Act) be deemed to be within the jurisdiction of and to be part of such foreign State.

26. In this Act, unless the context otherwise requires,—

The term 'British possession' means any colony, plantation, island, territory, or settlement within her Majesty's dominions, and not within the United Kingdom, the Channel Islands, and Isle of Man : and all colonies, plantations, islands, territories, and settlements under one legislature as hereinafter defined are deemed to be one British possession.

The term 'legislature' means any person or persons who can exercise legislative authority in a British possession, and where there are local legislatures as well as a central legislature, means the central legislature only.

The term 'governor' means any person or persons administering the government of a British possession, and includes the governor of any part of India.

The term 'extradition crime' means a crime which, if committed in England, or within English jurisdiction, would be one of the crimes described in the first schedule to this Act.

The terms 'conviction' and 'convicted' do not include or refer to a conviction which under foreign law is a conviction for contumacy, but the term 'accused person' includes a person so convicted for contumacy.

The term 'fugitive criminal' means any person accused or convicted of any extradition crime committed within the jurisdiction of any foreign State who is in, or is suspected of being in, some part of her Majesty's dominions ; and the term 'fugitive criminal of a foreign State' means a fugitive criminal accused or convicted of an extradition crime committed within the jurisdiction of that State.

The term 'Secretary of State' means one of her Majesty's principal Secretaries of State.

The term 'police magistrate' means a chief magistrate of the Metropolitan police courts, or one of the other magistrates of the Metropolitan police court in Bow Street.

The term 'justice of the peace' includes in Scotland any sheriff, sheriff's substitute, or magistrate.

The term 'warrant' in the case of any foreign State includes any judicial documents authorising the arrest of a person accused or convicted of crime.

27. The [6 and 7 Vict., cc. 75, 76 ; 8 and 9 Vict., c. 120 ; 25 and 26 Vict., c. 70 ; and 29 and 30 Vict., c. 121,] are hereby repealed as to the whole of her Majesty's dominions : and this Act (with the exception of anything contained in it which is inconsistent with the treaties referred to in the Acts so repealed) shall apply (as regards crimes committed either before or after the passing of this Act) in the case of the foreign States with which those treaties are made, in the same manner as if an order in council referring to such treaties had been made in pursuance of this Act, and as if such order had directed that every law and ordinance, which is in force in any British possession with respect to such treaties, should have effect as part of this Act.

Provided that if any proceedings for, or in relation to, the surrender of a fugitive criminal have been commenced under the said Acts previously to the repeal thereof, such proceedings may be completed and the fugitive surrendered in the same manner as if this Act had not passed.

First Schedule.—The following list of crimes is to be construed according to the law existing in England or in a British possession, as the case may be, at the date of the alleged crime, whether by common law or by statute made before or after passing of this Act :—

Murder, and attempt and conspiracy to murder.

Manslaughter.

Counterfeiting and altering money and uttering counterfeit or altered money.

Forgery, counterfeiting, and altering, and uttering what is forged or counterfeited or altered.

Embezzlement and larceny.

Obtaining money or goods by false pretences.

Crimes by bankrupts against bankruptcy law.

Fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company made criminal by any act for the time being in force.

Rape.

Abduction.

Child-stealing.

Burglary and housebreaking.

Arson.

Robbery with violence.

Threats by letter or otherwise with intent to extort.

Piracy by law of nations.

Sinking or destroying a vessel at sea, or attempting or conspiring to do so.

Assaults on board a ship on the high seas with intent to destroy life or to do grievous bodily harm.

Revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master.

The following Act was passed in 1873 :—36 and 37 Vict., c. 60. An Act to amend the Extradition Act 1870.

Be it enacted as follows :—

1. This Act shall be construed as one with 'The Extradition Act, 1870' (in this Act referred to as the principal Act), and the principal Act and this Act may be cited together as the 'Extradition Acts, 1870 and 1873,' and this Act may be cited alone as the 'Extradition Act, 1873.'

2. Whereas by section six of the principal Act it is enacted as follows :

'Where this Act applies in the case of any foreign State, every fugitive criminal of that State who is in, or suspected of being in, any part of her Majesty's dominions, or that part which is specified in the order applying this Act (as the case may be), shall be liable to be apprehended and surrendered in manner provided in this Act, whether the crime in respect of which the surrender is sought was committed before or after the date of the order, and whether there is or is not any concurrent jurisdiction in any court of her Majesty's dominions over that crime ;'

And whereas doubts have arisen as to the application of the said section to crimes committed before the passing of the principal Act, and it is expedient to remove such doubts, it is therefore hereby declared that :—

A crime committed before the date of the order includes in the said section a crime committed before the passing of the principal Act, and the principal Act and this Act shall be construed accordingly.

3. Whereas a person who is accessory before or after the fact, or counsels, procures, commands, aids, or abets the commission of any indictable offence, is by English law liable to be tried and punished as if he were the principal offender, but doubts have arisen whether such persons, as well as the principal offender can be surrendered under the principal

Act, and it is expedient to remove such doubts: it is therefore hereby declared that:—

Every person who is accused or convicted of having counselled, procured, commanded, aided or abetted the commission of any extradition crime, or of being accessory before or after the fact to any extradition crime, shall be deemed for the purposes of the principal Act, and this Act, to be accused or convicted of having committed such crime, and shall be liable to be apprehended and surrendered accordingly.

4. Be it declared that the provisions of the principal Act relating to depositions and statements on oath taken in a foreign State, and copies of such original depositions and statements, do and shall extend to affirmations taken in a foreign State and copies of such affirmations.

5. A Secretary of State may by order under his hand and seal require a police magistrate or a justice of the peace to take evidence for the purposes of any criminal matter pending in any court or tribunal in any foreign State: and the police magistrate or justice of the peace, upon the receipt of such order, shall take the evidence of every witness appearing before him for the purpose in like manner as if such witness appeared on a charge against some defendant for an indictable offence, and shall certify at the foot of the depositions so taken, that such evidence was taken before him, and shall transmit the same to the Secretary of State; such evidence may be taken in the presence or absence of the person charged, if any, and the fact of such presence or absence shall be stated in such deposition.

Any person may, after payment or tender to him of a reasonable sum for his costs and expenses in this behalf, be compelled for the purposes of this section to attend and give evidence, and answer questions, and produce documents in like manner and subject to the like conditions as he may in the case of a charge preferred for an indictable offence.

Every person who wilfully gives false evidence before a police magistrate or justice of the peace under this section shall be guilty of perjury.

Provided that nothing in this section shall apply in the case of any criminal matter of a political character.

6. The jurisdiction conferred by section sixteen of the principal Act on a stipendiary magistrate and a sheriff or sheriff's substitute shall be deemed to be in addition to, and not in derogation or exclusion of, the jurisdiction of the police magistrate.

7. For the purposes of the principal Act and this Act a diplomatic representative of a foreign State shall be deemed to include any person recognised by the Secretary of State as a consul-general of that State, and a consul or vice-consul shall be deemed to include any person recognised by the governor of a British possession as a consular officer of a foreign State.

8. The principal Act shall be construed as if there were included in the first schedule to that Act the list of crimes contained in the schedule to this Act.

SCHEDULE.—The following list of crimes is to be construed according to the law existing in England or in a British possession (as the case may be) at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act:—

Kidnapping and false imprisonment.

Perjury and subornation of perjury, whether under common or statute law.

Any indictable offence under the 24 and 25 Vict., cc. 96, 97, 98, 99, 100, or any Act amending or substituted for any of the same respectively.

Any indictable offence under the laws for the time being in force in relation to bankruptcy.

By the 15 and 16 Vict., cap. 26, it is enacted that whenever it is made to appear to the British Government that due facilities will be given for recovering and apprehending seamen who desert from British merchant ships in the territories of any foreign Power, an Order in Council, stating that such facilities are or will be given, may declare that seamen, not being slaves, who desert from merchant ships belonging to a subject of such Power when within British dominions, shall be liable to be apprehended and carried on board their respective ships, and the operation of such order may be limited, and made subject to such qualifications as may be deemed expedient. Every justice of the peace or other officer having jurisdiction in the case of seamen who desert from British merchant ships in British dominions, shall, on application being made by a Consul of the foreign Power to which such Order in Council relates, or his representative, aid in apprehending any seaman or apprentice who deserts from any merchant ship belonging to a subject of such Power, and may, upon complaint on oath duly made, issue his warrant for the apprehension of such deserter, and upon due proof of the desertion, order him to be conveyed on board the vessel to which he belongs, or to be delivered to the owner or his agents, or to the master or mate of such vessel, to be conveyed on board. Any person who protects or harbours any deserter, liable to be apprehended under this Act, and having reason to believe that the same has deserted, shall be liable to a penalty of ten pounds. Every Order in Council under this Act shall be published in the *London Gazette*.

Arrangements have been made under this statute for the mutual surrender of merchant-seamen deserters between Great Britain and the following Powers :—

Austria, 1880
Belgium, 1855
Brazil, 1888
Bremen, 1852
Chili, 1856
Columbia, 1866
Denmark, 1881
Ecuador, 1886
France, 1854
Germany, 1880
Greece, 1887
Hanover, 1854

Hanse Towns, 1852
Hawaiian Islands, 1876
Italy, 1863
Madagascar, 1866
Mecklenberg-Schwerin, 1854
Mexico, 1889
Morocco, 1857
Netherlands, 1854
Nicaragua, 1860
Oldenburg, 1853
Peru, 1852

Portugal (by 12 and 13 Vict., c. 25), 1849
Russia, 1860
Salvador, 1863
Siam, 1866
Spain, 1860
Sweden and Norway, 1852
Tunis, 1876
Turkey, 1865
Uruguay, 1886
Zanzibar, 1887

CHAPTER VIII

RIGHTS OF LEGATION AND TREATY

1. Right of legation an essential attribute of sovereignty—2. Of semi-sovereign and dependent States—3. This right, how affected by civil war—4. Refusal to receive particular persons—5. Conditional reception of a diplomatic agent—6. What department of Government may send and receive such agents—7. On diplomacy and the art of negotiation—8. Right of negotiation and treaty—9. Martens on European treaties—10. Treaties by semi-sovereign and dependent States—11. Treaty-making power of a State—12. Treaties, in general, to be ratified—13. Exception in cases of truces, &c.—14. Sponsions and their ratification—15. Legislation necessary to carry them into effect—16. Constitution of the United States on this subject—17. Treaty with France in 1831—18. Treaty with Great Britain in 1824—19. Auxiliary legislation in United States and Great Britain—20. Real and personal treaties—21. Other divisions of treaties—22. Equal and unequal treaties—23. Treaties of guarantee and surety—24. Treaties of confederation and association—25. Treaties of alliance, of succour and subsidy—26. Treaties of amity or friendship—27. Treaties of commerce, of boundaries, of cession—28. Violation of the faith of treaties, how punished—29. Use of an oath or asseveration—30. Conditions to make a treaty binding—31. Attempts of the Popes to annul the obligation of treaties—32. Guarantees and securities—33. Duration of guarantees and withdrawal of pledges—34. Dissolution and termination of treaties—35. Effect of loss of sovereignty—36. Debts previously contracted—37. Remarks of Kent and Wheaton on the interpretation of treaties—38. Rules of Grotius—39. Of Vattel—40. Collision of stipulations—41. Rules of Rutherford—42. Of Paley—43. Minute rules of other writers—44. Objections to arbitrary formulæ—45. Importance of well-established principles.

§ 1. ANOTHER essential attribute of sovereignty is *the right of legation and treaty*. Legation consists in sending diplomatic agents to other States, and in receiving such as are sent by them. This right of an independent sovereign State to send and receive diplomatic agents is regarded, in international law, as a *perfect* one; but the obligation to do so is deemed *imperfect*, for, strictly speaking, no State can be compelled either to send or to receive such agents. Nevertheless, usage and comity have established a sort of reciprocal duty in this respect. The maintenance of permanent diplomatic missions between different States is regarded as evidence of a mutual

Right of
legation
essential
to sove-
reignty

desire to continue the relations of peace and amity. On the contrary, a refusal to establish such means of diplomatic intercourse, or a discontinuance of them when once established, is, in most cases, regarded as an indication of unfriendly feeling, or, at least, of an indisposition to cultivate amicable relations. This, however, will depend very much upon the nature and importance of the relations between the States, and their ability to maintain permanent diplomatic missions. If two States be so situated that they can have very little commercial or political intercourse, such missions would be unnecessary. Moreover the smaller States can hardly be expected to bear the burthen of the expense of maintaining them with all other States.¹

Of semi-sovereign States, &c.

§ 2. How far the rights of legation belong to a semi-sovereign or dependent State, must depend upon its relations to the superior with which it is connected or under whose protection it is placed. Its sovereignty not being complete, it may, or may not, be entitled to a right incident to sovereignty, according to the nature and circumstances of the case. Thus, by the constitution of the United States of America, every State is expressly forbidden from entering, without the consent of Congress, into any agreement or compact with another State, or with a foreign Power, and their original power of sending and receiving public ministers is essentially modified, if not entirely taken away, by this prohibition. Under the constitution of the former German Empire and Germanic Confederation, of the former Swiss Confederation, and of the former United Provinces of the Low Countries, the right of legation was preserved by the princes and States composing these unions.²

How affected by civil war

§ 3. Strictly speaking, every State has the exclusive right to determine in whom its sovereign authority is vested.

¹ Wheaton, *Elem. Int. Law*, pt. iii. ch. i. § 2 ; Vattel, *Droit des Gens*, liv. iv. ch. v. §§ 55-65 ; Réal, *Science du Gouvernement*, tom. v. p. 140 ; Rousset, *Cérémonial Diplom.*, tom. ii. p. 481 ; Riquelme, *Derecho Púb. Int.*, lib. ii. tit. ii. cap. Ad. 1 ; Horne, *On Diplomacy*, sec. i. §§ 5, 6 ; Wicquefort, *L'Ambassadeur et ses Fonctions*, liv. i. ch. iii. ; Rutherford, *Institutes*, b. iii. ch. ix. § 20 ; Martens, *Précis du Droit des Gens*, §§ 185-190 ; Polson, *Law of Nations*, § 5 ; Phillimore, *On Int. Law*, vol. ii. § 114 ; Ompteda, *Litteratur des Völkerrechts*, vol. ii. p. 351 ; Martens, *Guide Diplomatique*, § 5 ; Bowyer, *Universal Public Law*, ch. xx. ; Bello, *Derecho Internacional*, pt. iii. cap. i. § 2 ; Heffter, *Droit International*, § 200.

² Kluber, *Droit des Gens Mod.*, pt. ii. tit. ii. ch. iii. § 175 ; Merlin, *Répertoire*, verb. 'ministre public,' sec. ii. § 6.

Nevertheless, in case of a revolution or civil war, foreign States must, of necessity, judge for themselves whether they will continue their accustomed diplomatic relations with the former Government, or commence them with the revolutionary party. This is sometimes a question of great delicacy, and in order to avoid any positive decision of it, diplomatic intercourse is either entirely suspended until the final termination of the contest, or is partially kept up by means of diplomatic agents, of special and limited authority, who are not vested with full ministerial powers, nor entitled to diplomatic honours. But where the accustomed diplomatic relations are to be maintained, the safest and least objectionable rule is to continue them with the *de facto* Government, whatever that may be, because, for the time being, that may properly be regarded as representing the sovereignty of the State.

§ 4. As a State is not under a perfect obligation to receive diplomatic agents from another, it may refuse to receive any particular individual, either on the ground of personal character, or of the authority conferred upon him. Thus, in France, where the legates or nuncios of the Pope were the bearers of powers which were deemed incompatible with the constitution and laws of the State, it was deemed proper to refuse to receive such agents until their powers were reduced to reasonable limits ; and, excepting the interval of the reign of James II., Great Britain has, since the reign of Queen Elizabeth, partly for political and partly for religious reasons, abandoned diplomatic relations with the Pope.¹ Again, the reception of a foreign diplomatic agent has sometimes been refused on the ground of personal character, or known hostility to the sovereign, or the State to which he is sent. Indeed, the sending of a person in a diplomatic capacity, who is known to be odious or objectionable to the Court to which he is accredited, if not a direct insult, is certainly far from being an evidence of friendly intentions, or of a desire to maintain friendly relations. A nation may refuse to receive one of its own citizens as the representative of a foreign Power, and in

Refusal to
receive a
particular
person

¹ It was enacted in 1848 (11 and 12 Vict., c. 108) ' That notwithstanding anything contained in any Act or Acts now in force, it shall be lawful for her Majesty, her heirs and successors, to establish and maintain diplomatic relations and to hold diplomatic intercourse with the sovereign of the Roman States.' There were some qualifications as to the non-ecclesiastical character of the envoy. This statute was repealed in 1875.

some countries it is a State maxim that a subject is not to be received in such a capacity. An English subject may not act as a diplomatic agent in England.¹ And such was the rule in the French² and Swedish³ Courts and in the United Provinces. But in recent times two French subjects have been accredited to, and received by, the French Court as the representative ministers of foreign Powers—Count Pozzo di Borgo as minister of Russia, and the Count de Bray as minister of Bavaria. They appear to have been naturalised in the countries which they represented.⁴ But when a diplomatic agent is once received, he is entitled to all the privileges, immunities, and honours annexed by the law of nations to his public character, except where modified by special conditions attached to his reception.⁵

Con-
ditional
reception

§ 5. We have just stated that some Governments have established, as a fundamental rule in their diplomatic intercourse with other States, that they will not receive one of their own native subjects as a minister from a foreign Power ; others again refuse to receive one of their own subjects in any diplomatic capacity, except on condition that he shall be amenable to the local laws and local jurisdiction. Where the reception is refused, it is proper that the motives or grounds of the refusal be alleged ; and where conditions are annexed, they must be *expressed* before or at the time of the reception, for, otherwise, the agent is entitled to claim the full rights and honours annexed to the office which he fills. There are no tacit or implied conditions in such receptions which can modify or limit the public character in which he is received, and with which he was accredited by the sovereign State which sent him.⁶

What de-
partment
may send
and
receive

§ 6. The question, with respect to what department of the government belongs the right of sending and receiving diplomatic agents, depends upon the municipal constitution of the State. In monarchical governments, this prerogative usually resides in the sovereign ; in republics, it is generally vested in

¹ *Case of Dr. Stewart*, House of Commons, June 2, 1871.

² De Caillères, *Traité de la Manière de négocier avec les Souverains*, ch. vi. p. 72.

³ *Codex Legum Sueciæ*, tit. 'De Crimin.', § 7.

⁴ Twiss, *Law of Nations*, ch. ii. p. 276.

⁵ Bynkershoek, *De Foro Legat.*, cap. xi. § 10 ; Moser, *Versuch.*, b. iii. p. 89 ; Wildman, *Int. Law*, vol. i. pp. 83 et seq.

⁶ Garden, *De la Diplomatie*, liv. v. § 2.

the chief executive, or in the president and his council, or the senate, conjointly. In the United States of America, the President alone receives a foreign minister, and the appointment of a minister to a foreign court is made by the President, with the advice and consent of the Senate. In monarchical countries there is also a distinction sometimes made in the rank of the representatives of a foreign State, with respect to the department of government which is to receive them, those of the highest rank being received by the sovereign, and those of a lower grade by the secretary, or minister of foreign affairs. But this subject will be more particularly discussed in another place.

§ 7. Many publicists have written at considerable length on the art of diplomacy, and some seem to have based their remarks on the idea that a peculiar tact, finesse, or talent for deception, not required, or even allowed, in other professions, was absolutely necessary to successful negotiation. Indeed, in the diplomacy of the middle ages, it was proclaimed, as a maxim of the art, that 'dissimulation must be met by dissimulation, and falsehood by falsehood,' and, at even later periods, and in the most refined courts of Europe, bribery, gallantry, and intrigue were regarded as the most effective arguments in the discussion of diplomatic questions. But such disreputable means of negotiation are now seldom resorted to, and the most able diplomatists of the present age are men as much distinguished for their exalted personal character and unimpeachable integrity, as for their talents and learning. While a knowledge of the rules of diplomacy, and of the laws regulating the international rights and duties of States, is absolutely indispensable in a public minister, it may be remarked, that good manners and good temper seem peculiarly necessary in an officer so intimately connected with the etiquette of polite society and ceremonies of courts.¹

§ 8. The right of a State to negotiate and contract public treaties with other nations is, like the right of legation, a necessary incident to its sovereignty. This power exists in full vigour in every State which has not parted with this portion of its natural sovereignty, or has not agreed to modify

Exercise
of the
right may
be re-
stricted
by treaty

¹ Flassan, *De la Diplomatie*, tom. i. pp. 235, 246, 247; Machiavelli, *Il Principe*, Discorso 2; Mably, *Droit des Gens*, tom. i. pp. 15 et seq.

its exercise by some compact with other States. Sovereign and independent States are sometimes restricted in their power to make new treaties by the conditions of alliances already formed with others. Such limitation affects the *exercise* of the power of negotiating treaties, but is not regarded as a modification of the *power* itself. But if, by alliance or otherwise, a State has parted with its general power to negotiate treaties and to contract obligations, it can no longer be regarded as completely sovereign and independent. It has lost one of the essential attributes of sovereignty.¹

By in-
fluence of
powerful
neigh-
bours

§ 9. Martens admits that, in theory, every sovereign State has a right to form, with other Powers, whatever treaties may appear to be conducive to its interests, provided such treaties do not violate the equal rights of others; but, he adds, the general practice of Europe has been very different, many of the smaller States, nominally sovereign and independent, being forced, against their will, to accede to treaties in the formation of which they were not even consulted. He gives a number of examples to prove the truth of his statement. There are, no doubt, numerous instances in the history of Europe where the well-established principles of international law have been violated, and many States, *nominally* sovereign and independent, are really mere dependencies of their more powerful neighbours. But these exceptions are rather instances of an abuse of power. It should not, however, be forgotten that minor States, by accepting, as a matter of course, the arrangements made by the Great Powers of Europe, tacitly recognise that those Powers occupy a primacy, and superintending authority, over them.²

¹ *Vide ante*, ch. iii.

² Martens, *Précis du Droit des Gens*, § 119; Pinheiro-Ferreira, *Notes sur Martens*, No. 63; Martens, *Recueil des Traités*, tom. v. p. 222.

The question has often been raised whether a Christian State can enter into a valid treaty with an Infidel nation. Grotius says that, according to the law of nature, there can be no doubt of the validity of such treaty (lib. ii. c. xv. 8). A pirate is not an *enemy* in the true sense of the word, although he is termed *hostis humani generis*. Some pirates have reduced themselves into a government or State, as did those of Tunis, Tripoli, and Algiers. They acknowledged the supremacy of the Porte, but that Government had little or no control over them. When Louis IX. of France attempted to destroy these pirates, he summoned a council of war to determine whether it was fit that the then solemn ceremonies of declaring war should be lavished on a company of thieves and pirates. The answer was unanimously in the negative (Fuller, *Holy War*, lib. iv. ch. xxvii.). Yet because these pirates acknowledged the supremacy

§ 10. The right of semi-sovereign and dependent States to contract, by treaty, is, like their right of legation, to be determined by the nature of their connection with, or dependence on, others. We have already shown that a colony, or ordinary dependency, is a part of a State, but cannot itself be regarded as a distinct political organisation, possessing the essential attributes of a State ; that the mere fact of dependence, or of feudal vassalage and the payment of tribute, or of occasional obedience, or of habitual influence, does not destroy, although it may greatly impair, the sovereignty of the States so situated. We have also shown the effects of a protectorate, of a confederation, and of a union, upon the sovereignty of the protected, confederated, and united States. The powers of such States to contract, by treaty, will necessarily depend upon the character of the relations thus formed with others. Thus, the sovereign members of the former Germanic Confederation could each make treaties of alliance and commerce, not inconsistent with the fundamental laws of the Confederation ; in the former Swiss Confederation, of 1815, the Diet, consisting of one deputy from each of the twenty-two cantons, had the exclusive power of concluding treaties of peace, alliance and commerce with foreign Powers. Again, the several States, constituting the United States of America, are expressly prohibited by the Federal constitution from entering into any treaty, agreement, or compact with foreign Powers, without the consent of the Federal congress. A foreign Power, treating with a semi-sovereign, dependent, or confederated State, is bound to know how far such State is capable of contracting obligations by treaty. If it contract with a State incapable of entering into such engagements, the treaty is necessarily invalid.¹

Treaties
with
dependent
States

of the Porte and had become a sort of State, some contended that they should receive a notification of war. In the reign of Charles II., if not earlier, they obtained the right of legation, for a formal peace was concluded between Sir John Lawson in the name of his Majesty and 'the most excellent signiors Mahomet Bashaw, the Divan of the noble city of Tunis, Hagge Mustapha Dei, Morat Bei, and the rest of the soldiers in the kingdom of Tunis,' October 5, 1662. This was confirmed by the Porte 'the last day of the Moon Delcadi and the year of Hegira, 1085.' Similar articles were concluded with Tripoli and Algiers, and confirmed in like manner.

¹ Pando, *Derecho Internacional*, pt. iii. cap. i. § 2 ; Riquelme, *Derecho Púb. Int.*, lib. i. tit. i. cap. xv. ; Wheaton, *Elem. Int. Law*, pt. iii. ch. ii. § 1 ; Vattel, *Droit des Gens*, liv. ii. ch. xii. § 55 ; *Constitution of the*

Treaty-
making
power

§ 11. The treaty-making power of a State is determined by its own constitution, or fundamental law. In monarchical governments it is usually vested in the reigning sovereign, sometimes, however, subject to restrictions. In republics it is usually vested in the chief executive, either alone or conjointly with a council or senate. By the constitution of the United States of America, the President has power, by and with the advice and consent of the senate, to make treaties, provided that two-thirds of the senators present concur. This power is general, and, of course, embraces all sorts of treaties, for peace or war. The President has, therefore, no power to terminate a war by a treaty of peace, without the concurrence of two-thirds of the senators present. This, however, does not prevent his entering into a truce with any enemy for the suspension of hostilities. That power results from his office as commander-in-chief of the army and navy of the United States. Military conventions, as shown hereafter, form a part of the *commercium belli*, and do not require the treaty-making power of the State, either for their negotiation or ratification.

Treaties
must in
general be
ratified

§ 12. The question how far, under the positive law of nations, ratification by the State in whose name the treaty is made, by its duly authorised minister or diplomatic agent, furnished with full power, is essential to the validity of the treaty, was at one time the subject of much doubt and discussion. But it is now the settled usage to require such ratification,¹ even where this pre-requisite is not reserved by the express terms of the treaty itself. The municipal constitution of the State determines in whom the power of ratification resides. By the constitution of the United States of America, treaties are negotiated and concluded under the authority of the president, but the advice and consent of the Senate is essential to enable him to pledge the national faith, by making a treaty the supreme law of the land.²

Exception
in cases
of truces,
&c.

§ 13. There are, however, certain compacts or conventions relating to the pacific intercourse of belligerent nations

United States, art. i. sect. 10; Story, *Com. on the Constitution*, §§ 1347 et seq.

¹ See on this subject, which cannot be reduced to a few words, *Hansard's Debates*, July 24, 1853, 'Treaty between Austria and the Porte'; *ibid.*, May 22, 1871, 'Treaty with the United States.'

² Klüber, *Droit des Gens Mod.*, § 48.

which may be concluded, not in virtue of any special authority vested by the State in its agents, but in the exercise of a general implied power incidental to their official stations, such as the official acts of generals, and admirals suspending hostilities within the limits of their respective commands, truces, capitulations, cartels for the exchange of prisoners, special licences to trade, ransom of captured property, &c. Such compacts do not, in general, require the ratification of the supreme power of the State, unless such ratification be expressly reserved in the act itself. These will be more particularly discussed in another place.¹

§ 14. But sometimes compacts or engagements of this kind **Sponsions** are made by officers without proper authority, or exceeding the limits of the authority under which they purport to be made, as, for example, a truce for the suspension of arms beyond the limits of the command of the general who makes it. Such acts are called *sponsions*, or treaties *sub spe rati*,² and must be confirmed by express or tacit ratification to make them binding. The former is given in positive terms and with the usual forms; the latter is implied, from the fact of acting under the agreement as if bound by its stipulations. Mere silence is not sufficient, though good faith requires that the party who refuses its ratification should notify the other without undue delay; and if, in the meantime, the ratifying party, acting in good faith upon the supposition of the due authority of the agent, should have totally or partially performed his part of the agreement, he is entitled to be indemnified or replaced in his former position.³

‘The convention concluded at Closter-Seven,’ says Wheaton, ‘during the Seven Years’ War, between the Duke of Cumberland, commander of the British forces in Hanover, and Marshal Richelieu, commanding the French army, for a suspension of arms in the North of Germany, is one of the most remarkable treaties of this kind recorded in modern history. It does not appear, from the discussions which took place between the two Governments on this occasion, that there was any disagreement between them as to the true principles of inter-

¹ *Post.*, ch. xxix. Bello, *Derecho Internacional*, pt. i. cap. ix. § 4; Grotius, *De Jure Bel. ac Pac.*, lib. iii. cap. xxii. §§ 6–8; Polson, *Law of Nations*, sect. v.

² See on this subject, the ‘Hope,’ 1 *Dods.*, 230.

³ Rutherford, *Institutes*, b. ii. ch. ix. § 21.

national law applicable to such transactions. The conduct, if not the language, of both parties implies a mutual admission that the convention was of a nature to require ratification, as exceeding the ordinary powers of military commanders in respect to mere military capitulations. The same remark may be applied to the convention signed at El Arish, in 1800, for the evacuation of Egypt by the French army ; although the position of the two Governments, as to the convention of Closter-Seven, was reversed in that of El Arish, the British Government refusing in the first instance to permit the execution of the latter treaty, upon the ground of the defect in Sir Sidney Smith's powers, and, after the battle of Heliopolis, insisting upon its being performed by the French when circumstances had varied and rendered its execution no longer consistent with their policy and interest.'¹ Lawrence in his commentaries on the above says :—'The capitulation of Closter-Seven, in 1757, which rendered Marshal Richelieu master of the States of the King of England in Germany, and of those of his allies, gave him, moreover, the facility of sending new succours to the Empress Queen and to the Elector of Saxony, as well as of attacking the King of Prussia in the Duchy of Magdeburg. But the King of England, in his quality of Elector of Hanover, refused to ratify the capitulation, which was thus annulled, and the Hanoverians, who had promised no longer to bear arms, resumed them two months afterwards. The motives assigned for the refusal of the capitulations were :—1st. That the army which had capitulated belonged to the Elector, and that it was resuming active service as the army of the King of Great Britain. 2. That the capitulation had been concluded without powers, as well on the part of the Duke of Cumberland as of the Marshal Richelieu.'

'The refusal of the British Admiral, Lord Keith, to recognise the convention of El Arish, already in part executed by France, was placed on the orders of his Government, forbidding him to consent to any capitulation with the French army, except on their laying down their arms and becoming prisoners of war, and delivering up their ships in Alexandria. After the rupture of the armistice, which was followed by the battle of Heliopolis and the reconquest of Egypt by Kleber,

¹ Lawrence's *Wheaton*, p. 688.

when the condition of the French army was entirely changed, England offered, in vain, to ratify the convention, which, though actually negotiated by Sir Sidney Smith and containing stipulations, on the part of England, essential to the evacuation, was only signed by the plenipotentiaries of Kleber and of the Grand Vizier.' Hall remarks on this, 'The insinuation made by Wheaton that the English Government acted in bad faith is inexcusable. His reference to the Parliamentary discussions shows that he had, at least at some time, been acquainted with the facts.'¹

§ 15. The question has sometimes been discussed, whether a treaty, duly ratified, is obligatory upon the contracting parties, independently of the auxiliary legislation necessary to carry it into complete effect. This will depend, in a measure, upon the limitations upon the treaty-making power expressed in the constitution, or fundamental laws of the State. A general power to make and ratify treaties, necessarily implies the power to determine the terms upon which they shall be made; but the municipal constitution of a State may have limited this power, by prohibiting it from making engagements of a certain character, without the joint action of the legislative department of the government. This limitation, where not expressed in the fundamental laws of the State, is sometimes necessarily implied in the distribution of powers to its constitutional authorities. Commercial treaties, for example, which have the effect of changing the existing laws of trade and navigation of the contracting parties, may require the sanction of the legislative power in each State for their execution. In such cases it is usual to stipulate in the treaty that it shall not be binding till the proper laws are passed for carrying it into effect. Thus, the commercial treaty of Utrecht, between France and Great Britain, was never carried into effect, the British Parliament having rejected the bill which was brought in for the purpose of modifying the existing laws of trade and navigation, so as to adapt them to the stipulations of that treaty. So, also, where an appropriation of money is required by the terms of the treaty, and which can be made only by the legislative power, it may be stipulated in the treaty itself that it shall be held subject to the making of the necessary appropriation for that

Legis-
lation to
give effect
to treaties

¹ Hall, *Int. Law*, p. 552.

purpose. But where the treaty is made, and ratified by competent authority, with no express or implied limitations in the treaty-making Power, it is considered obligatory upon the contracting parties, and it is the duty of the legislative power of the State to pass the laws, and to make the appropriations necessary to carry it into complete effect.¹

Under the
constitution of the
United
States

§ 16. By the constitution of the United States, treaties made and ratified by the President, with the advice and consent of the Senate, are declared to be 'the supreme law of the land,' and it seems to be understood that Congress is bound to redeem the national faith thus pledged, and to pass the laws necessary to carry their stipulations into effect. It is true that their execution is dependent upon such auxiliary legislation, but it is, nevertheless, the duty of every department of government to assist in performing all the obligations properly incurred by the whole State. This question has been frequently discussed in the legislative halls of Congress. It especially came under the consideration of the House of Representatives in 1796, with respect to the treaty of 1794 with Great Britain; in 1816, on the commercial convention with the same Power; in 1842-3, with respect to the treaty of Washington; and in 1853-4, with respect to the convention with Mexico. In each and every one of these cases the necessary appropriations were made for carrying into effect treaties duly entered into by the President and the Senate. If, when a treaty, duly entered into by the President, and ratified by the Senate, comes before the House of Representatives, that body were to proceed to discuss and examine it as an act of ordinary legislation, and, at its pleasure, grant or refuse the requisite appropriation for carrying it into effect, it would virtually annul the present constitutional provisions with respect to treaties, and make that body a branch of the treaty-making power.

Case of
France
in 1831

§ 17. That the omission of Congress to pass the necessary Acts for carrying a treaty into effect, would be no answer to a foreign government for the non-fulfilment of treaty stipulations, is to be deduced from the ground taken by the United States with France, when the legislative power of the latter State refused to vote the moneys required by the convention of 1831, by which indemnities were provided for the spoliation

¹ Lord Mahon, *Hist. of England*, vol. i. p. 24; Calvo, § 697.

of American commerce. With respect to this controversy, Mr. Wheaton said : ' Neither Government has anything to do with the auxiliary legislative measures necessary, on the part of the other State, to give effect to the treaty. The nation is responsible to the government of the other nation for its non-execution, whether the failure to fulfil it proceeds from the omission of one or other of the departments of its government to perform its duty in respect to it. The omission here is on the part of the legislature, but it might have been on the part of the judicial department. The Court of Cassation might have refused to render some judgment necessary to give effect to the treaty. The king cannot compel the Chambers, neither can he compel the Courts ; but the nation is not the less responsible for the breach of faith thus arising out of the discordant action of the internal machinery of its constitution.' ¹

§ 18. This case is broadly distinguished from that of the convention entered into between Mr. Rush, on the part of the United States, and Mr. Canning, on the part of Great Britain, in 1824, with respect to a mutual right of search of vessels suspected of being engaged in the slave-trade. The Senate ratified the treaty, but annexed to it alterations and modifications, among other things an amendment exempting the sea-coasts of the United States from the *surveillance* of the British cruisers. Mr. Canning refused to ratify the treaty as amended ; he further objected that the Senate could not introduce any change into a treaty once negotiated. But was it not Mr. Canning's duty to have known that, by the constitution of the United States, the ratification was vested in the Senate ? ²

§ 19. How far auxiliary legislation may be necessary to carry into effect the stipulations of treaties must depend, in a measure, upon the particular constitution of each State. The doctrine of the British constitution, as stated by Blackstone, is that, ' whatever contracts the king engages in, no other

¹ *Pinkney, Life of*, by Wheaton, pp. 517-549 ; Kent, *Com. on Amer. Law*, vol. i. p. 285 ; Story, *On the Constitution*, § 1502 ; Wheaton, *Elem. Int. Law*, pt. iii. ch. ii. § 7, note ; *President's Message*, Dec., 1834 ; *Annual Register*, 1834, p. 361.

² Webster, *Off. and Dip. Papers*, pref., pp. 18-19 ; *American State Papers*, 1824 ; Holmes, *Annals of America*, vol. ii. p. 506 ; Lawrence, *On Visitation and Search*, p. 28 ; *Cong. Doc.*, 18 Cong., 2nd Sess., Doc. No. 2 ; Hansard, *Parl. Debates* (N.S.), vol. xi. p. 1 ; *Annual Register*, 1824, p. 119.

Case of
Great
Britain
in 1824

How far a
treaty
operates
proprio
vigore

power in the kingdom can legally delay, resist, or annul.' Nevertheless, the treaty binds nobody till its provisions are enacted by law, and a treaty cannot be pleaded in the courts unless confirmed by an Act of Parliament. In the United States the constitution declares a treaty to be 'the supreme law of the land.' It is, therefore, regarded by the Courts as equivalent to an Act of Congress, wherever it operates *proprio vigore*, without the necessity of legislative provisions; and, as such, all concerned are bound to obey it, and, within their competence, to execute it. Any law conflicting with a treaty would be declared by our Courts as unconstitutional. But when the terms of the stipulation import a contract, and either of the parties engages to perform a particular act, the treaty addresses itself to the political, rather than the judicial, department of the government, and the legislature must execute the contract before it can become a rule for the Court. Congress, though it cannot be compelled by any other branch of the government to pass the law for that purpose, is bound, by the highest moral and political obligations, so to do; and, in point of fact, it has rarely hesitated, and never omitted, to do its duty in this respect.¹

**Real and
personal
treaties**

§ 20. General compacts between nations have been variously divided by text-writers.² One of the most import-

¹ Foster et al. *v.* Neilson, 2 *Peters. R.*, 314; United States *v.* Arredondo, 6 *Peters. R.*, 735; Blackstone, *Comm.*, i. 257; Polson, *Law of Nations*, sect. 5.

² To these compacts should be added 'Concordats.'

In the early days of Christianity the conventions intended to settle differences between the bishops and the religious communities were called *concordats*. This term is only applied now to treaties between the Holy See and foreign Catholic Governments, concerning relations between the Catholic Church and the State; it determines the attributes or the rights of the one and of the other in matters which do not concern questions of faith—for these can never become the subjects of a compromise—but only questions of ecclesiastical discipline, the organisation of the clergy, the limits of dioceses, and the nomination to episcopal sees. In a concordat the Pope stipulates as sovereign pontiff, as chief of Catholicity, and not as a temporal prince. The treaties in which he formerly took part in the latter quality, and which had exclusively a political character and end, are to be considered and treated like those which are concluded between State and State. They must not, therefore, be confused with concordats. The most ancient concordat known is that concluded at Worms, in 1122, between Calixtus II. and Henry V. During the sixteenth century the Holy See entered into a great many concordats with different States of Europe. Concordats were made with France in 1516, 1801, 1813, and 1817. Different concordats existed between Rome and the two principal States of the Italian peninsula, but they were virtually abrogated by the incorporation of these States with the Kingdom of Italy (1859 to 1862).

ant of these divisions is into *personal* and *real* treaties ; the first including only treaties of mere personal alliance, such as are expressly made with a view to the person of the reigning sovereign or his family, and the latter relating only to the things of which they treat, without any dependence on the person of the contracting parties. The first bind the State during the existence of the persons referred to, or their public connection with the State, but expire with the natural life or public authority of those who contract them, while the latter bind the contracting parties independently of any change in the constitution or rulers of the State. *Real* treaties include those made for a determinate time, as well as those which are, from their nature, perpetual.

§ 21. There are numerous other divisions of treaties which have been made with respect to their object or general character, as *equal* and *unequal* treaties ; treaties of *guarantee* and *surety* ; treaties of *confederation* and *association* ; treaties of *alliance* and of *succour* and *subsidy* ; treaties of *cession*, of *boundaries*, of *friendship*, of *commerce*, of *arbitration*, &c. The character and duration of these several kinds of treaties are very different. It not unfrequently happens, however, that the same treaty relates to various things, and that some of its articles are perpetual, while others have reference only to past transactions, or are for a temporary object, and continue only

Other
divisions

Spain entered into a concordat in 1851. Portugal signed a concordat in 1857, which was ratified in 1859. The following concordats have been made—viz. : with Austria, in 1855 ; with Bavaria, in 1817 ; with Würtemberg, in 1857 ; with the Grand Duchy of Baden, in 1859 ; and conventions (in the nature of concordats) have been made with Prussia in 1857, and with Hanover in 1824. Some of the Swiss cantons entered into a concordat in 1828. Russia entered into a convention (in the nature of a concordat) in 1847 with respect to Poland. It was not promulgated until 1856. It may now be considered as virtually annulled. The Republic of Costa Rica, in America, entered into a concordat in 1852.

‘The concordats of the Holy See,’ says Heffter, ‘with the Catholic Powers, as well as its conventions with non-Catholic princes (which are not called concordats), are another source of the relations which are established between the Church and the State ; and sometimes the special conventions, concluded with the prelates of the Church within the scope of their functions, may be equally so considered. The obligatory force of the concordats and conventions in no way differs from that of public treaties. Often the Holy See has not even refused to enter into treaty with infidel Powers. It is not the Church, but certain churchmen, by far too indiscreet in their zeal, who have dared to raise serious doubts whether it is necessary to carry out in good faith engagements entered into between the Church and non-Catholic Powers.’ (Heffter, *Droit International*, § 40.)

for a determinate time. It is, therefore, necessary to distinguish the character of the engagements, rather than the nature of the things to which they relate. Thus, stipulations with respect to boundaries, cession or exchange of territory, to public debts, to the tenure of property by each other's subjects, are permanent in their nature, and although their operation may, in some cases, be suspended during war, they revive on the return of peace, unless expressly abrogated or altered. Other stipulations entirely cease on the declaration of war, and require a new treaty to revive them.¹

Equal and
unequal
treaties

§ 22. Treaties are sometimes divided by publicists into *equal* and *unequal*. *Equal* treaties are where the contracting parties promise the same or equivalent things; and *unequal* treaties are where the things promised are neither the same nor equitably proportioned. These different classes of engagements are sometimes spoken of as *bilateral* and *unilateral*. The latter, however, are more properly applied to treaties where promises are made by only one party, without any corresponding engagements, either equal or unequal, by the other. Equal and unequal treaties are to be distinguished from equal and unequal alliances, the latter division having reference to the equality or difference in the rank or dignity of the contracting parties, rather than the character of the engagements entered into. Thus, in treaties of alliance, the treaty may be equal, and the alliance very unequal, and *vice versa*. The inequality in the stipulations, or engagements of a treaty, does not, in general, render such engagements any the less binding upon the contracting parties.²

Of gua-
rantee and
surety

§ 23. Treaties of *guarantee*, and of *surety*, are engagements by which a State promises to aid another against any interruption of certain specified rights, such as boundaries, territory, constitution or form of government, &c. By the Treaty of 1713 ('the treaty of guarantee of the Protestant succession and of the Dutch barrier') the Protestant succession to the throne of England is guaranteed by Austria, France, Holland, and Spain. By the treaty of 1832 between Bavaria, France, Great Britain, and Russia, the monarchy and independence of Greece was guaranteed. By the treaty of 1839 between

¹ The Society, &c., *v.* Newhaven, 8 *Wheaton R.*, p. 464; Sutton *v.* Sutton, 1 *Russell and Mylne R.*, p. 663.

² Heineccius, *Elementa de Jure et Gent.*, lib. ii. §§ 207-211.

Austria, Belgium, France, Great Britain, Holland, Prussia, and Russia, the independence and perpetual neutrality of Belgium was guaranteed. A distinction is made between guarantee and surety ; where the matter relates to things to be done by the party for whom the obligation is contracted, the surety is bound to make good the promise in default of the principal, while the guarantor is only obliged to use his best endeavours to obtain its performance from the principal himself. How far a State may legally contract this class of obligations must depend, first, upon its own constitution, and, second, upon the nature of the stipulations with respect to any interference with, or infringement of, the sovereign rights of other independent States.¹

§ 24. Treaties of *confederation*, and treaties of *association*, Of con-
federation
and asso-
ciation not only differ from treaties of general alliance, but are to be distinguished from each other. Treaties of confederation are usually made for the purpose of forming a union, more or less close, in reference to certain specified objects with respect to internal or external matters ; as, for instance, the German custom-house confederation² and the American colonial confederation. Treaties of association are usually made for the purpose of war, two or more States associating themselves together for the purpose of carrying on joint operations against a common enemy. Treaties of alliance are, on the contrary usually entered into for the purpose of common security and general defence, but without reference to any particular power, or to any special event. They may, however, in certain cases, as will be shown hereafter, amount to a *warlike association*.³

§ 25. Treaties of alliance have been subdivided into different classes, such as treaties of *real* and *personal* alliance ; Treaties of
alliance of *equal* and *unequal* alliance ; of *general* and *special* alliance ; of *defensive* and *offensive* alliance, &c. The first two classes have already been described. General and special alliances may be either defensive or offensive, or both. They, however, differ from each other in their character, and in their

¹ Flassan, *Hist. de la Dip.*, tom. viii. p. 195 ; Phillimore, *On Int. Law*, vol. ii. §§ 56 et seq.

² The Zollverein began in 1818, but the treaty of March 22, 1833, is the basis of its union. Several changes were made in 1867. It now includes the whole German empire.

³ Heffter, *Droit International*, §§ 91–93 ; Puffendorf, *De Jure Nat. et Gent.*, lib. v. cap. viii. § 3 ; Grotius, *De Jure Bel. ac Pac.*, lib. ii. cap. xxi. § 24 ; Kluber, *Précis du Droit des Gens*, § 129.

effects with respect to the *casus fœderis*, in the event of a war between one of the allies and a third party. General alliances must also be distinguished from treaties of limited *succour* and *subsidy*. The latter may have no reference to an eventual engagement in general hostilities, and they do not necessarily render the party furnishing them the enemy of the opposite belligerent. Treaties of alliance may expire by their own limitation, or may be dissolved by the consent of the contracting parties, or by a declaration of war between them.¹

Of amity
or friend-
ship

§ 26. Among the ancient nations treaties were sometimes entered into, by which the parties simply stipulated to remain *friends*, and to observe toward each other those specific relations which international law now impose upon all, without the formality of formal engagements, such as the obligations to render justice, to accord satisfaction for injuries, &c. These were called *treaties of amity or friendship*. But, in modern times, this term is usually applied to *treaties of recognition*, which have for their object the admission of a new body politic into the family of nations, or the recognition of a new title assumed by a State, or its ruler, already recognised as sovereign and independent.

Of com-
merce,
bound-
aries, &c.

§ 27. Treaties of *commerce* are those which regulate the conditions of reciprocal trade, and define and secure the imperfect rights and duties of commercial intercourse.² Such

¹ Vattel, *Droit des Gens*, liv. ii. chs. xii. xiii. ; liv. iii. ch. vi. ; Wheaton, *Elem. Int. Law*, pt. iii. ch. ii. §§ 13, 14 ; Wildman, *Int. Law*, vol. i. ch. iv. ; Bello, *Derecho Internacional*, pt. i. cap. ix. § 2.

² Among these treaties may be included the Convention entered into in 1878 (by virtue of Article 18 of the Treaty of Berne, 1874), by the principal civilised States, and by several Colonies, whereby they agreed that they, as well as the countries which might join it thereafter, should form, under the title of 'Universal Postal Union,' a single postal territory for the reciprocal exchange of correspondence by post.

Also, the Declarations entered into since 1877 between Great Britain and some other countries, whereby the subjects of those Powers have in the dominions of the other the same rights as belong to native subjects with regard to 'Trade Marks.'

Also the agreements between certain States and Great Britain with regard to mutual assistance in the case of deserters from merchant ships ; and the agreements between Great Britain and certain countries with regard to mutual arrangements for the relief of distressed seamen of those countries. Also the international regulations 'for preventing collisions at sea' which were in 1880 agreed to by, and declared applicable to, the ships of Austria, Belgium, Brazil, Chili, Cochin, Denmark, Ecuador, France, Germany, Greece, the Hawaiian Islands, Hayti, Italy, Japan, Kattayawar, Khelat, Kutch, the Netherlands, Muscat, Norway, Portugal, Russia, Spain, Sweden, Travancore, Turkey, the United States of America

treaties have not unfrequently terminated with a declaration of war between the contracting parties. Treaties of *boundary* and of *cession* are usually of a more permanent character. What particular branch of the Government may make these different kinds of treaties, and how, in general, they are to be ratified, when they become obligatory, and when the legislative authority is requisite to carry them into effect, will depend upon the constitution or political organisation of the Governments of the contracting parties. The proceedings and formalities requisite for this purpose are not only different in different States, but frequently vary, in the same State, with the character of the treaty and the nature of its stipulations.¹

§ 28. 'As all nations,' says Vattel, 'are interested in maintaining the faith of treaties, and causing it to be everywhere regarded as sacred and inviolable, so likewise they are justifiable in forming a confederacy for the purpose of repressing him who disregards it.' . . . 'Such a sovereign deserves to be treated as an enemy of the human race.'² The foregoing remarks of Vattel, with respect to nations combining together for the punishment of a State which violated its treaty stipulations, are not sustained by later authorities. A plain and indisputable violation of a treaty is, undoubtedly, a violation of the law of nations. While a treaty imposes on the one hand a perfect obligation, it produces on the other a perfect right.³ To violate a treaty is, therefore, to violate a perfect

Violation
of the
faith of
treaties

and Zanzibar. These regulations are held by the United States to be part of international law, having been adopted by the principal maritime nations. (The 'Scotia' and the 'Berkshire,' 14 *Wall.*, 170.) An international telegraphic convention was entered into at St. Petersburg, July 10-22, 1875; between Austria, Belgium, France, Germany, Greece, Italy, Netherlands, Persia, Portugal, Russia, Sweden and Norway, Switzerland, and Turkey. This Convention has been acceded to by Great Britain. Also the Convention of 1887 between Great Britain, Germany, Belgium, Spain, France, Hayti, Italy, Switzerland, and Tunis, by which these countries constitute themselves a Union for the protection of the rights of authors over their literary and artistic works. There is power to admit other countries to this Union.

¹ Ortolan, *Diplomatie de la Mer*, liv. i. ch. v. ; Mably, *Droit Pub. de l'Europe*, tom. ii. ch. xii. ; Kluber, *Droit des Gens Mod.*, § 152.

² Vattel, *Droit des Gens*, liv. ii. ch. xv. §§ 221, 222.

³ Referring, in February, 1877, to the obligations of the joint guarantee of Great Britain under the Treaty of Paris, Lord Derby said that if the Powers which had a right to call upon Great Britain to act did not do so, he did not see that it was for Great Britain to enter into the question of what might be their motives or the determining causes which had prevented those Powers from so calling on that country. That is the affair

right of him with whom it was contracted. Moreover, such violations are injurious to other States who are not parties to the treaty, for, in the words of Vattel, 'we can no longer depend on the conventions to be made, if those that are made are not maintained.' Nevertheless, they cannot be classed with piracy, or violence to the person of an ambassador. One who openly violates the obligations of a treaty will incur the disgrace of infamy and the reproach of mankind, but, so far as penal consequences are concerned, it is only the injured party who is justified in resorting to open and solemn war for the purpose of inflicting punishment.

Use of an
oath in
treaties

§ 29. The use of an oath in treaties does not constitute a new obligation, nor does it strengthen the obligation already contracted. The most that could ever be said of it was, that it gave some additional solemnity to the act, and imposed a *personal* obligation upon the sovereign who took the oath, or gave commission to another to swear for him. It could neither give validity to an invalid treaty, nor a pre-eminence to one treaty above another. The custom, once generally received, of swearing to treaties, has now entirely passed away. 'Even children,' says Vattel, 'know that an oath does not constitute the obligation to keep a promise or a treaty ; it only gives additional strength to that obligation, by calling God to bear witness. A man of sense, or a man of honour, does not think himself less bound by his word alone, by his faith once pledged, than if he had added the sanction of an oath.' The most modern example of the use of the oath was in the alliance between France and Switzerland, 1777. Asseverations are sometimes used in engagements or treaties between sovereigns : such as, *we promise in the most sacred manner ; with good faith ; solemnly ; irrevocably ; and pledge our royal word, &c.* These are now regarded as mere forms of expression, showing that the parties entered into the engagement with reflection, deliberation, and a full knowledge of what they were doing. The words added nothing to the obligation of the treaty. But the formal and deliberate manner in which

Use of
asseve-
ration

of the former, not of the latter. 'The doctrine,' said he, 'that if you have once bound yourself by treaty to protect any State, you are equally bound to protect it, however unwisely that State may have acted, and though it may have put itself wholly in the wrong, and been the cause of its own difficulty, is one which no one will seriously entertain.' (*Parl. Deb. H. of L.*, ccxxxii., 1006.)

treaties are now made and ratified, render such forms of expression entirely superfluous. Even a tacit engagement is as much binding as one made in express terms. Thus, everything which is necessarily understood in a treaty, and without which its stipulations cannot be carried out, is equally obligatory with the stipulations themselves.¹

§ 30. Martens says that, in order to make a treaty obligatory, the following five things are necessarily supposed: 1st. That the parties have power to contract. In other words, that the person or authority making the treaty, or ratifying it, had full power for that purpose. 2nd. That they have consented.² The form of such consent is entirely unimportant, provided it is fully and clearly declared. 3rd. That they have consented freely. The consent must have been a voluntary act of the contracting party. The plea of *fear*, however, cannot be opposed to the validity of treaties between nation and nation, except, at most, in cases where the injustice of the violence employed is so manifest as not to leave the least doubt. 4th. That the consent is mutual. 5th. That the execution is possible. The last two requisites are too plain to require explanation or comment.³

Condi-
tions to
make a
treaty
binding

§ 31. The Popes are alleged to have claimed at one time the authority to absolve sovereigns from their engagements, or to annul the obligations of treaties, under whatsoever solemnities they might be contracted. Vattel mentions a number of instances where, he says, they have undertaken to break the treaties of sovereigns, 'to unloose a contracting power from his engagements, and to absolve him from the oaths by which he had confirmed them;' and he adds, 'Who does not see that these daring acts of the Popes, which were formerly very frequent, were violations of the law of nations, and directly tended to destroy all the bands that could unite mankind, and to sap the foundations of their tranquillity, and to render the Pope sole arbiter of their affairs?'⁴

Attempts
of the
Popes to
annul the
obliga-
tions of
treaties

The conduct of the Popes in the middle ages has ever

¹ Vattel, *Droit des Gens*, liv. ii. ch. xv. §§ 225, 229.

² Consent to a treaty, whether written or oral, must be distinct. No supposition or *consensus fictus* is sufficient.

³ Martens, *Précis du Droit des Gens*, § 48.

⁴ Vattel, *Droit des Gens*, liv. ii. ch. xv. § 223; Salignac, *Hist. of Poland* vol. iv. p. 112; De Thou, *Hist. de suo Temp.*, lib. xvii.; Bougeau, *Hist. de T. de Westphalie*, vol. vi. p. 413; Choisy, *Hist. de Chas. V.*, p. 282; Heffter, *Droit International*, § 94.

been a fruitful source of denunciation by writers who have not troubled themselves to penetrate below the surface of the subject. They have arraigned these Popes before the tribunal of the nineteenth, or other century in which they wrote, and have then passed upon them a verdict of condemnation which was neither consistent nor just. There are two distinct orders in the government of mankind, viz. : the spiritual and the temporal. Each is independent in its own sphere and neither can possibly interfere with the other. In mixed questions alone will difficulties really arise. In these there are countless points of contact, where the boundary lines become indistinct or intersect, and on such occasions the two authorities arrive at a satisfactory arrangement by a concordat or convention. Society is never better governed than when these two orders unite and mutually assist and support each other. During the first three centuries they were necessarily in antagonism, because the laws of Pagan Rome prohibited the worship of Christians. Upon the conversion of the Emperor Constantine the Church began to assert openly its supremacy in the spiritual sphere. St. Athanasius ¹ has preserved a letter of Osius to the Emperor in which he concedes to him full, absolute and entire authority in all that relates to earthly affairs, but claims for the Supreme Pontiff perfect independence in things spiritual.

When the Roman Emperors in course of time became weak and unable to protect their subjects, the Popes were naturally applied to for assistance, and the temporal power, which is accidental, but not essential, to the Papacy, was gradually, as it were, forced upon them. At the fall of the Roman Empire the barbarian hordes that swept over the west of Europe would have obliterated every trace of civilisation had not the Church by the promulgation of her maxims softened their ferocity.

A beacon light thus arose in the midst of surrounding darkness and order was evolved from chaos. Under these circumstances it was only natural that the Head of the Christian world should exercise a powerful influence on

¹ 'Ne te misceas, imperator, rebus ecclesiasticis neque in hoc genere nobis præcipe ; tibi Deus imperium commisit, nobis quæ sunt ecclesiæ concredidit. . . . Neque igitur fas est nobis in terris imperium tenere, neque tu sacrorum potestatem habes, imperator.' (St. Athan. in *Epist. ad Sol. Vit. agentes.*)

civilised mankind, that men should refer to him in difficulties and doubt, and agree to accept his decision as final. They entered in fact into relations with him as with a feudal lord, and thus by common consent the Popes were raised into a position of power and responsibility which did not essentially belong to their office.

Society itself and the government necessary for its existence had their foundations laid, not on a social contract, nor on the capricious will of the multitude, as Rousseau maintained, but emanated in their ultimate analysis from the divine power, the definition of law given by Thomas Aquinas¹ being '*a rule dictated by reason, the aim of which is the public good, and promulgated by him who has the care of society.*' Therefore, in the middle ages when Christendom was united, a spirit of religion based on these conclusions vivified the whole framework or body of society.

To judge of the acts of the Papacy in those ages apart from the peculiar circumstances of its position, is an injustice. The governing power was not then regarded as a blind force, directed by the will of an irresponsible ruler, but as a moral entity existing in the moral order, and when it left that moral order and became illegitimate and tyrannical its *raison d'être* was gone and it deserved to perish. The deposing power, and the interference with oaths and contracts, cannot, therefore, be measured by modern principles, but must be viewed through the mirror of belief of the society then existing.

It is a principle of natural law that oaths and contracts (however solemn they may be) which are against the rights of a third party, are in themselves on that very account null and void, and the Popes as heads of Christendom have so declared it. Again, the Popes as feudal lords could disown contracts made by their own vassals which they had no right to make; but it is evident that in no case whatever could any Pope undo a just contract which was in itself valid.

To maintain, as some writers have done, that the Popes, living in a divided Christendom, claimed to exercise that power which was formerly urged upon their acceptance is untrue. 'Nolumus plane, carissime in Christo fili,' said Pope Pius VI. . . . 'in nullas ingredi contentiones, quales fuere

¹ 'Quædam rationis ordinatio ad bonum commune et ab eo qui curam communitatis habet promulgata' (l. 2, quæst. 90, art. 4).

Medio Ævo excitatæ . . . ab hisce disceptationibus alienus prorsus abhorretque animus noster, itaque altè nobis infixæ est charitas paterna, nec ulli juri tuo regiæque potestati quidquam derogare.'¹

Guaran-
tees and
securities

§ 32. 'Unhappy experience,' says Vattel, 'having shown that the faith of treaties, sacred and inviolable as it ought to be, does not always afford a sufficient assurance that they shall be punctually observed—mankind have sought for securities against perfidy—for methods, whose efficacy should not depend on the good faith of the contracting parties. A *guarantee* is one of those means. When those who make a treaty of peace, or any other treaty, are not perfectly easy with respect to its observance, they require the guarantee of some powerful sovereign. The party who *guarantees* promises to maintain the conditions of the treaty and to cause it to be observed.' The guarantee may be to all the contracting parties equally, or only to one of them. It is an agreement to cause the fulfilment of the conditions of the treaty, but it in no way affects the conditions themselves; the party guaranteeing, therefore, has no right to interfere between the contracting parties, and decide upon the interpretation which should be given to its stipulations. But if called upon by one of these parties for assistance to enforce the treaty against the other, he must judge for himself whether such assistance is justly due as against the party complained of. We have pointed out, in this chapter, the distinction between guarantee and surety, where the engagements relate to things to be done by the party for whom the obligation is contracted. Sometimes one of the contracting parties puts some of its property or possessions into the hands of another, for the security of its promises, debts, or engagements. Movable things thus remitted are called *pledges*; towns and provinces are given in *pawn* or *mortgaged*; and if the revenues are ceded as an equivalent for the interest of the debt, it is the fact called *antichresis*.² But these securities have no effect upon the obligations of the treaty. The party giving the security

¹ *Brief of Pius VI.*, Dec. 15, 1701.

² 'Antichresis' is used in Civil Law to denote the contract by which a creditor acquires the right of reaping the fruit, or other revenues, of the immovable property given to him in pledge, on condition of his deducting annually their proceeds from the interest due; the principal debt is similarly treated.

is no more excusable for refusing or neglecting to perform his engagements than if no securities whatever had been given.¹

§ 33. Questions have sometimes arisen with respect to the duration of the guarantee, and the withdrawal or release of the security. The guarantee naturally subsists until the stipulations guaranteed are performed, unless a certain time has been agreed upon for its termination. A general and indefinite treaty of guarantee may be changed or modified the same as any other treaty. As soon as the debt is paid, or the particular engagement is accomplished for which the security was given, the security ends, and the pledge should be returned, or the towns or provinces held in pawn or under mortgage, should be restored in the same condition in which they were received, so far as depends upon the holder. But this is not always done by those who thus hold the possession ; ‘ the temptation,’ says Vattel, ‘ is delicious ; they have recourse to a thousand quibbles, a thousand pretences, to retain an important place, or a country under their obedience. The subject is too odious for us to allege examples ; they are well enough known, and sufficiently numerous, to convince every sensible nation that it is very imprudent to make over such securities. But if the debt be not paid at the appointed time, or if the treaty be not fulfilled, what has been given in security may be retained and appropriated, or the mortgage seized, at least until the debt be discharged, or a just compensation made. The house of Savoy had mortgaged the country of Vaud to the cantons of Berne and Fribourg ; and these two cantons, finding that no payments were made, had recourse to arms, and took possession of the country. The Duke of Savoy, instead of immediately satisfying their just demands, opposed force to force, and gave them still further grounds of complaint ; wherefore the cantons, finally successful in the contest, have since retained possession of that fine country, as well for the payment of the debt as to defray the expenses of the war, and to obtain a just indemnification.’²

Duration
of guaran-
tees and
with-
drawal of
pledges

§ 34. Treaties may be dissolved, or their stipulations may

¹ Vattel, *Droit des Gens*, liv. ii. ch. xvi. §§ 235, 241 ; Gunther, *Europ. Völkerrecht*, b. ii. p. 154 ; Real, *Science du Gouvernement*, tom. v. ch. iii. sect. viii. ; Heineccius, *Elem. Juris*, p. 209.

² Vattel, *Droit des Gens*, liv. ii. ch. xvi. §§ 243, 244 ; Kluber, *Droit des Gens Mod.*, § 156 ; Garden, *De la Diplomatie*, liv. iv. sect. i. § 1.

**Dissolu-
tion and
termina-
tion of
treaties**

terminate in various ways. Some expire by their own limitation, while others are terminated by war between the contracting parties; some are permanent in their nature, and although their operation may be suspended during war, they revive on the return of peace, unless expressly abrogated or altered by a new compact; while others, again, have reference to both peace and war, or exclusively to a state of war, and consequently continue in force, notwithstanding an entire interruption of pacific relations between the contracting parties. Thus, treaties made for a fixed period of time, or for a specified object, expire on the termination of the time designated, or the accomplishment of the object specified. Treaties of alliance, of succour and subsidy, of commerce and navigation—in fine, all stipulations having reference exclusively to pacific relations, cannot be construed to subsist after such relations have become hostile. Nor is a positive declaration of war necessary to produce this result. In the difficulties of the United States with France in 1798–9, no public war was declared, but the two States were regarded as in hostile relation to each other, and subsisting treaties were held to be dissolved. Stipulations which relate to boundaries, to the tenure of property, to public debts, &c., and which are permanent in their nature, are suspended by war, but revive as soon as hostilities cease. The treaties of 1783 and 1794, between the United States and Great Britain, respecting confiscations and alienage, were of a permanent character, and the Supreme Court held that they were not abrogated by the war of 1812, although their enforcement was, for the time being, suspended. Stipulations relating to prizes, prisoners of war, blockades, contraband, &c., are unaffected by a declaration of war between the contracting parties, and can only be annulled by new treaties, or in the manner provided in the instruments themselves.¹

¹ Kent, *Com. on Amer. Law*, vol. i. p. 177; Riquelme, *Derecho Púb. Int.*, lib. i. tit. i. cap. xv.; Benton, *Thirty Years*, &c., vol. i. p. 487; *Bas v. Tingy*, 4 *Dallas R.*, 37; Webster's *Works*, vol. iv. p. 162.

In the case of 'The Society for the Propagation of the Gospel' *v.* New Haven, &c. (5 *Curtis R.*, 493), the Court did not feel inclined 'to admit the doctrine that treaties become extinguished *ipso facto* by war between the two Governments unless they should be revived by an express or implied renewal on the return of peace.' Whatever might be the latitude of doctrine laid down by elementary writers on the law of nations dealing in general terms in relation to the subject of private property, the Court was satisfied that there may be treaties of such a nature as to their object

§ 35. But the obligations of treaties, even where some of their stipulations are, in their terms, perpetual, expire in case either of the contracting parties loses its existence as an independent State, or in case its internal constitution is so changed as to render the treaty inapplicable to the new condition of things. With respect to alliances, Vattel remarks that 'when a people are forced to receive laws, they may legally renounce their preceding treaties, if he with whom they are constrained to enter into an alliance requires it from them. As they then lose a part of their sovereignty, their ancient treaties fall with the powers that had concluded them. This is a necessity that cannot be imputed to them, and since they had a right to submit themselves absolutely, and to renounce all sovereignty, if it became necessary for their preservation ; by a much stronger reason they have a right, under the same necessity, to abandon their allies. But a generous people will try every resource before they will submit to so severe and humiliating a law.' ¹

§ 36. A distinction must be made between obligations and debts already incurred, and those which would be incurred if the treaty had not been terminated before its time by such a change in the circumstances of one of the contracting parties as to render it inapplicable. A change of condition, as

Effect of
loss of
sovereignty

Debts
previously
con-
tracted

and import that war will put an end to them, but where treaties contemplate a permanent arrangement of territorial and other national rights, or which in their terms are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. 'If such were the law, even the treaty of 1783, so far as it fixed our limits and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning.' In 1830, the Master of the Rolls, in deciding a question on the 37 Geo. III., cap. 97, and the treaty of 1794, whether American subjects who held lands in England were to be considered, in respect of such lands, as aliens or subjects of Great Britain, or whether the war of 1812 had determined the treaty, said: 'The privileges of natives being reciprocally given not only to the actual possessors of land, but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should be permanent, and not depend upon the continuance of a state of peace.' (Sutton v. Sutton, 1 R. & M., 663.)

On January 17, 1871, the Plenipotentiaries of Germany, Austria, Great Britain, Italy, Russia, and Turkey, at the Conference of London, formally recognised that it is an essential principle of the law of nations that no Power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting Powers, by means of an amicable arrangement.'

¹ Vattel, *Droit des Gens*, liv. ii. ch. xii. § 176.

the partial loss of its sovereignty and independence, will not, in general, release such a State from obligations already incurred, although it may prevent any new ones from occurring out of the same instrument, the stipulations of which are no longer applicable or obligatory.¹

Remarks
of Kent
and
Wheaton
on the
interpre-
tation of
treaties

§ 37. 'Treaties of every kind,' says Kent, 'are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts.' The same general rule is laid down by Wheaton, but he adds: 'Such is the inevitable imperfection and ambiguity of all human language, that the mere words alone of any writing, literally expounded, will go a very little way toward explaining the meaning. Certain technical rules of interpretation have, therefore, been adopted by writers on ethics and public law, to explain the meaning of international compacts, in cases of doubt.' These rules are most fully expounded by Grotius, Vattel, Rutherford and Paley. We will give a brief outline of the principles of interpretation, as laid down by these authors.²

Rules of
Grotius

§ 38. Grotius has devoted an entire chapter to the interpretation of difficult and ambiguous terms. He sets out with the saying of Cicero, that, 'when you promise, we must consider rather what you mean, than what you say.' But as inward motives are not in themselves discernible, we can

¹ Wheaton, *Elem. Int. Law*, pt. iii. ch. ii. § 10; Phillimore, *On Int. Law*, vol. i. § 137; Suarez, *De Legibus*, &c., p. 109; Bello, *Derecho Internacional*, p. i. cap. ix. § 3.

During the war between Great Britain and the United States, it was enacted by the latter country that all persons who paid debts due to British subjects into the loan office would have a good discharge. When peace was concluded, the treaty provided that 'creditors of either side should meet with no lawful impediments for the recovery of their debts.' It was held by the Supreme Court of the United States that a defendant who had paid his debt to the loan office must, nevertheless, pay it again. The Court considered that in the construction of contracts words were to be taken in their natural and obvious meaning, unless some good reason were assigned to show that they should be understood in a different sense; that the universality of the terms were equal to an express specification on the treaty, and included it. If any description of debtors or class of cases were intended to be excepted, it would have been specified, but the indefinite and sweeping words made use of by the parties excluded the idea of any class of cases having been intended to be excepted. (*Ware v. Highton*, 3 *Dall. R.*, 199.)

² Kent, *Com. on Am. Law*, vol. i. p. 174; Wheaton, *Elem. Int. Law*, pt. iii. ch. ii. § 17.

determine what they were only from the *words* used, and *conjectures* drawn from other parts of the treaty, and from the peculiar circumstances of the particular case. These, he says, must sometimes be considered together, and sometimes separately. Words are not to be strictly construed according to their etymology, but according to their common use, as 'Use is the judge, the law, and rule of speech.' Technical words, or terms of art, are to be construed according to their meaning in such art. Conjectures are to be drawn from the subject matter, the effect of the terms used, and the circumstances under which the engagement was entered into. He divides things promised into three classes, *favourable*, *odious*, and *mixed*. Favourable promises are those which carry in them an equality and a common advantage ; odious promises are those where the charge and burthen is all on one side ; and mixed promises are those which partake of both characters, but in which the favourable predominates. In the first, he says, the words must be taken in their full propriety, as they are generally understood, and if ambiguous, they must be allowed their largest sense. In the second, the words are to be taken in a stricter sense, whether they have reference to the subject matter, time, or circumstances. In the third kind of promises, the words are to be taken according to the character of the particular stipulation in which they occur, or of the particular matter or circumstances to which they refer. These distinctions are particularly commented on by Vattel.¹

§ 39. Vattel lays down several maxims for the interpretation of treaties, which may be briefly stated as follows: Vattel's
rules

1st. It is not allowable to interpret what has no need of interpretation, for when a treaty is conceived in clear and precise terms, and the sense is manifest, and leads to no absurdity, there can be no reason for refusing the sense which is naturally presented and manifest. To go elsewhere in search of conjectures, is to endeavour to elude it. 2nd. If he who could, and ought to have explained himself clearly, has not done so, he cannot be allowed to introduce subsequent restrictions for his own benefit. *Pactionem obscuram iis nocere, in quorum fuit potestate legem assertius conscribere.* 3rd. Neither of the contracting powers is allowed to interpret the treaty at his own pleasure. 4th. As the party which made the promise

¹ Vattel, *suprà* ; Grotius, *De Jure Bel. ac Pac.*, lib. ii. cap. xvi.

ought to have known his intention, what he has sufficiently declared must be taken for true against him. 5th. The interpretation should be made according to the rules established for determining the sense in which the parties naturally understood it when the treaty was entered into. He next proceeds to lay down the following particular rules on which the interpretation ought to be formed, in order to be just and right: 1st. We must seek to discover the thoughts of the parties who drew up the treaty, and interpret it accordingly. Thus, we must give to a disposition the full extent properly implied in the terms, if such appears to have been the intention of the parties; but its signification should be restrained, if it is probable that the parties at the time so understood it. 2nd. No mental reservations can be admitted. 3rd. Common expressions and terms are to be taken according to common custom. 4th. Technical terms,¹ or terms proper to the arts and sciences, are generally to be interpreted according to the definition given to them by persons versed in such art or science. 5th. We should give to equivocal expressions the sense most suitable to the subject or matter to which they relate. 6th. The same term is not necessarily to be taken in the same sense wherever it appears in the same instrument. 7th. Every interpretation that leads to an absurdity should be rejected. 8th. An interpretation that would render a treaty null and without effect should be rejected. 9th. Vague and obscure expressions should be interpreted in such a manner as to agree with the terms which are clear and without ambiguity. 10th. The whole treaty must be considered together, and an interpretation given to each particular expression so as to agree with the tenor of the whole instrument. 11th. The words of a party should be construed in accordance with the general reasons and motives of the agreement. 12th. The interpretation may be restrictive or extensive, according to reasons and probable intention of the contracting parties.

¹ It may be convenient to explain that the diplomatic expression *protocol* signifies the register on which the deliberations of a conference, &c., are inscribed, whence the word comes to signify, also, the deliberations themselves.

The primitive meaning of *protocol* is the original copy of any writing. Among the Romans *protocollum* was a writing at the head of the first page of the paper used by the notaries or tabellions. The minutes of notarial acts were formerly transcribed on registers which were called 'protocols.'

The foregoing is a brief statement of the rules laid down and discussed at great length by Vattel.¹

The case of the famous Clayton-Bulwer Treaty is a good illustration of the necessity of observing the first of the foregoing maxims laid down by Vattel.

The acquisition of California, in May, 1848, by the treaty of Guadalupe-Hidalgo, and the vast rush of population which followed almost immediately on the development of the gold mines to that portion of the Pacific coast, made the opening of interoceanic communication a matter of paramount importance to the United States. In December, 1846, a treaty with New Granada (which in 1862 assumed the name of Colombia) had been ratified, by which a right of transit over the Isthmus of Panama was given to the United States, and the free transit over the Isthmus 'from the one to the other sea' guaranteed by both of the contracting Powers. Under the shelter of this treaty the Panama Railroad Company, composed of citizens of the United States, and supplied by capital from the United States, was organised in 1850, and put in operation in 1855. In 1849, before this company had taken shape, the United States entered into a treaty with Nicaragua for the opening of a ship-canal from Greytown (San Juan) on the Atlantic coast to the Pacific coast, by way of the Lake of Nicaragua. Greytown, however, was then virtually occupied by British settlers, mostly from Jamaica, and the whole eastern coast of Nicaragua, so far at least as the eastern terminus of such a canal was concerned, was held, as it was maintained by Great Britain, by the Mosquito Indians, over whom Great Britain claimed to exercise a protectorate. The United States affirmed that the Mosquito Indians had no such settled territorial site; that, if they had, Great Britain had no such protectorate or sovereignty over them as authorised her to exercise dominion over their soil, even if they had any. But the fact that such claim was made by Great Britain, even if not admitted by the United States, and that any attempt to force a canal through the Mosquito country might precipitate a war, induced Mr. Clayton, Secretary of State in the administration of General Taylor, to ask the Go-

¹ Vattel, *Droit des Gens*, liv. ii. ch. xvii. §§ 263-298.

As to whether stipulations of a treaty can be set up by persons not parties to it, see the 'Jonge Josias,' *Edw.*, 130.

vernment of Great Britain, through Sir H. L. Bulwer, British Minister at Washington, to withdraw their claims to the coast so as to permit the construction of the canal under the joint auspices of the United States and of Nicaragua. This the British Government declined to do, but agreed to enter into a treaty (the Clayton-Bulwer Treaty) for a joint protectorate over the proposed canal. At the time of the execution of this treaty the British Government claimed dominion over (1) Bay Islands, including the island of Ruatan, and other islands on the ocean adjoining Honduras ; (2) the Mosquito coast ; and (3) the Belize, or British Honduras. The United States alleged that the British Government continued after the execution of the treaty to exercise the above dominion in defiance of the renunciation contained in the first article of the treaty,¹ whereas in fact Great Britain was merely exercising a protectorate over the Mosquito Indians, which she had exercised prior to the execution of the treaty, and which she insisted on continuing to exercise, on the ground that the possibility of such a protectorate was clearly recognised, although limited and restricted by the treaty. An attempt was made to remove the collision which was thus threatened by a new treaty (Clarendon-Dallas), which, however, failed from the non-acceptance by Great Britain of the amendments introduced into the treaty by the Senate of the United States. Great Britain, on her side, undertook to lessen the cause of offence by negotiating, in November, 1859, a treaty with Honduras, in which she stipulated to surrender to that

¹ The Article is as follows :—

‘ Article 1.—The Governments of the United States and of Great Britain hereby declare that neither the one nor the other will ever obtain or maintain for itself any exclusive control over the said ship-canal ; agreeing that neither will ever erect or maintain any fortifications commanding the same, or in the vicinity thereof, or occupy, or colonise, or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America ; nor will either make use of any protection which either affords, or may afford, or any alliance which either has or may have to or with any State, or people, for the purpose of erecting, or maintaining any such fortifications, or of occupying, fortifying, or colonising Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America, or of assuming or exercising dominion over the same ; nor will the United States or Great Britain take advantage of any intimacy, or use any alliance, connection, or influence that either may possess, with any State or Government, through whose territory the said canal may pass, for the purpose of acquiring or holding, directly or indirectly, for the citizens or subjects of the one any rights or advantages, in regard to commerce or navigation, through the said canal which shall not be offered on the same terms to the citizens or subjects of the other.’

Republic her claim to Ruatan and the Bay Islands ; and in the same year she executed a treaty with Guatemala for the defining the boundaries of British Honduras, or the Belize, as it is more properly to be called. In January, 1860, she entered into a treaty with Nicaragua, by which she, with some qualifications, withdrew from the protectorate over the Mosquito country. Those treaties having been, in 1860, communicated officially to President Buchanan, he stated, in his Annual Message (December, 1860), that ' the discordant constructions of the Clayton-Bulwer Treaty between the two Governments, which at different periods of the discussion bore a threatening aspect, have resulted in a final settlement entirely satisfactory to this Government.'¹

§ 40. Where treaties or treaty stipulations are in collision or opposition—that is, where two promises are not contradictory in themselves, but are of such a nature as to render it impossible to fulfil both at the same time—Vattel lays down the following rules for determining which shall have the preference. 1st. If what is permitted is incompatible with what is prescribed, the latter is to be preferred. 2nd. What is permitted must yield to what is forbidden. 3rd. What is ordained must yield to what is forbidden. 4th. Other things being equal, that of the most recent date is to be preferred. 5th. A special promise is to be preferred to a general one. 6th. What, from its nature, cannot be delayed is to be preferred to what may be done at another time. 7th. When two promises or duties are incompatible, that of the highest honesty and utility is to have the preference. 8th. If we cannot perform at the same time two promises to the same person, he may select which he prefers. 9th. The stronger obligation has the preference over the weaker ; and 10th. What is promised under the higher penalty, has the preference over one with the lesser penalty, or with no penalty at all.²

Collision
of stipu-
lations

§ 41. Rutherford has discussed this subject with his usual perspicuity and ability, but in a manner somewhat diffuse. We will attempt but a brief outline of his remarks, referring the reader to his chapter on interpretation, the perusal of which will afford both pleasure and profit. A promise, he

Rules of
Ruther-
forth

¹ Wharton, *Int. Law Dig.*, vol. ii. 150 f.

² Vattel, *Droit des Gens*, liv. ii. ch. xvii. §§ 311–322 ; Puffendorf, *De Jure Gent.*, lib. v. cap. xii. § 23 ; the ' Ringerode Jacob,' 1 *Rob.*, 89 Richardson v. Anderson, 1 *Camp. R.*, 65, note.

says, gives us a right to whatever the promiser ~~designed or~~ intended to make ours. But his design or intention, if it ~~be~~ considered merely as an act of his mind, cannot be known to anyone besides himself. When, therefore, we speak of his design or intention as the measure of our claim, we must necessarily be understood to mean the design or intention which he has made known or expressed by some outward mark ; because a design or intention, which does not appear, can have no more effect, or can no more produce a claim, than a design or intention which does not exist. Hence, the way to ascertain our claims, as they arise from promises or contracts, is to collect the meaning and intention of the promiser or contractor, from some outward signs or marks. The collecting of a man's intention from such signs or marks is called *interpretation*.¹

Paley on
promises

§ 42. The remarks of Dr. Paley, in his work on 'Moral and Political Philosophy,' are well worthy of attention, being as applicable to questions of international law as to questions in ethics. He says : 'Where the terms of promise admit of more senses than one, the promise is to be performed in that sense in which the promiser apprehended at the time that the promisee received it.' 'It is not the sense in which the promiser actually intended it that always governs the interpretation of an equivocal promise, because, at that rate, you might excite expectations which you never meant, nor would be obliged to satisfy. Much less is it the sense in which the promisee actually received the promise ; for, according to that rule, you might be drawn into engagements which you never designed to undertake. It must, therefore, be the sense (for there is no other remaining) in which the promiser believed that the promisee accepted the promise. This will not differ from the actual intention of the promiser, where the promise is given without collusion or reserve ; but we put the rule in the above form to exclude evasion in cases in which the popular meaning of a phrase and the strict grammatical signification of the words differ ; or, in general, wherever the promiser attempts to make his escape through some ambiguity in the expressions which he used. Zemures promised the garrison of Sebastia, that, if they would surrender, no blood should be shed. The garrison surrendered,—and Zemures buried them all alive. Now,

¹ Rutherford, *Institutes*, b. ii. ch. vii. § 1.

Zemures fulfilled the promise in one sense, and in the sense, too, in which he intended at the time ; but not in the sense in which the garrison of Sebastia actually received it, nor in the sense in which Zemures himself knew that the garrison received it ; which last sense, according to our rule, was the sense in which he was, in conscience, bound to have performed it.'¹

§ 43. Many efforts have been made by other writers to lay down precise and positive rules, and to frame formulæ for the various modes of interpretation. In order to facilitate this, a nomenclature of classes, modes, and species of construction has been attempted, and numerous cases, actual or possible, have been resorted to for the purpose of elucidating these definitions, and of exhibiting the application of these rules. Thus, Lieber distinguishes between interpretation and construction, dividing the former into close, extensive, extravagant, limited or free, predestinated, and authentic ; and the latter into close, comprehensive, transcendant, and extravagant. The classifications, rules, and arbitrary formulæ which he has given under these heads are more calculated to astonish and puzzle the reader, as a metaphysical curiosity, than to afford any real assistance in the interpretation or construction of treaties or laws. The same remark is applicable, in a qualified sense, to the numerous rules of the learned Domat. Others, again, as Mackelday and Phillimore, have adopted a more simple classification, and fewer and more general rules.²

§ 44. The best modern writers on interpretation have confined themselves to stating the general principles which are to guide us in ascertaining the true meaning of a treaty, law or contract, avoiding all metaphysical distinctions, minute subdivision of terms, and the use of arbitrary formulæ. Of this character are the rules laid down by Story, in his Commentaries on the Constitution of the United States. He regards some of the rules of Vattel as erroneous, but speaks in high terms of those given by Rutherford, a summary of which is found in the preceding paragraphs. Savigny regards the civil law rules of interpretation—which are substantially those of Domat—as affording little aid beyond that which an intelligent and dispassionate consideration of each particular case

¹ Paley, *Moral and Pol. Philosophy*, b. iii. pt. i. ch. v.

² Lieber, *Legal and Pol. Hermeneutics*, 120, 144, 167-172 ; Domat, *Lois Civiles*, liv. prélim. tit. i. § 2 ; Phillimore, *On Int. Law*, vol. ii. pt. v. ch. viii. ; Rayneval, *Inst. du Droit Nat.*, liv. iii. ch. xxiv. ; Pando, *Derecho Int.*, pp. 230 et seq.

would furnish. Sedgwick thinks it 'as vain to attempt to frame positive and fixed rules of interpretation as to endeavour, in the same way, to define the mode by which the mind shall draw conclusions from testimony.' . . . 'Nor do I believe it easy to prescribe any system of rules of interpretation for cases of ambiguity in written language, that will really avail to guide the mind in the decision of doubt.'¹

Import-
ance of
well-es-
tablished
principles

§ 45. But while we fully agree with Savigny and Sedgwick, that metaphysical classifications, minute subdivisions, and arbitrary formulæ, are not calculated to facilitate the interpretation and construction of laws, it must not be inferred that all rules established for that purpose should be rejected. On the contrary, general rules, which restrain from latitudinarian construction, and from extravagant and false interpretation, have received the approval of the most learned jurists and most distinguished publicists of all ages. Indeed, the very necessity and importance of such rules, for the interpretation of constitutional and statutory laws, have led some authors into the extravagant nomenclature and minute classification which are here objected to. Sedgwick, notwithstanding his objection to rules, very justly remarks that 'there must be some general principles to control' the construction and interpretation of laws, the subject being too important 'to be left to the mere arbitrary discretion of the judiciary.'

And if the necessity of well-established rules for the interpretation of laws be generally admitted, it certainly will hardly be denied that such rules are equally important in connection with international jurisprudence.² Some of the bloodiest wars

¹ Story, *On the Constitution*, vol. i. ch. v. ; Savigny, *Das Obligationenrecht*, b. ii. p. 189 ; Sedgwick, *On Stat. and Con. Laws*, ch. vi.

² The following is a list of English and of American reported cases bearing on the interpretation of treaties :—

ENGLISH REPORTS

- Elphinstone *v.* Bedrecchund, 2 *Knapp's P.C.R.*, 340.
- Maltass *v.* Maltass, 1 *Rob. Ecc. Rep.*, 67.
- Lindo *v.* Rodney, *Dougl. R.*, 340.
- Hotham *v.* East India Company, *ibid.* 277.
- Chalmers' *Collection of Opinions*, ii. pp. 345-6.
- Marryat *v.* Wilson, 1 *Bos. and Pull.*, 436-9.
- The 'Diana,' 5 *Rob.*, 60.
- The same, *ibid.* 67.
- The 'Fama,' *ibid.* 106.
- The 'Zacheman,' *ibid.* 152.
- The 'Charlotte,' *ibid.* 305.
- The 'Eliza Ann,' 1 *Dods.*, 244.
- The 'Molly,' *ibid.* 394.

that have been inflicted upon the human race have originated in a conflict of opinions respecting the interpretation of treaty stipulations. Moreover, it not unfrequently happens, that when one nation seeks an excuse for quarrelling with another, or for encroaching on another's rights, some old and long-forgotten treaty is brought forth from the dusty archives, or some new interpretation is introduced, with corresponding allegations of a violation of its stipulations. It is not pretended that any rules of interpretation, however complete or well established they may be, will entirely prevent such conflicts and aggressions; nevertheless, they will greatly contribute toward such a result, or, at least, will prevent the real aggressor in an unjust war from escaping the odium which should attach to one who disturbs the peace of nations, under the cloak of a false interpretation of treaty stipulations.¹

The 'Rigende Jacob,' 1 *Rob.*, 89.

Richardson *v.* Anderson, 1 *Camp.*, 65.

Judicial evidence in Great Britain of the Acts of a foreign State is regulated by the provisions of 14 and 15 Vict., c. 99.

AMERICAN REPORTS.

Foster *v.* Neilson, 2 *Peters.*, 253.

Gordon *v.* Kerr, 1 *Washington's C. C.*, 322.

Society *v.* Newhaven, 8 *Wheaton*, 464.

United States *v.* Percheman, 7 *Peters.*, 51.

The 'St. J. Indiano,' 2 *Gall.*, 268.

Blight *v.* Rochester, 7 *Wheaton*, 535.

Whitaker *v.* English, 1 *Bay.*, 15.

Hutchinson *v.* Brock, 11 *Massachusetts*, 119.

The 'Pizarro,' 2 *Wheaton*, 227.

The 'Santisima Trinidad,' 7 *Wheaton*, 283.

Hylton *v.* Brown, 1 *Washington's C. C.*, 343.

Bolchos *v.* Three Negro Slaves, *Bees. Admiralty*, 74.

British Consul *v.* Ship 'Mermaid,' *ibid.*, 69.

Henderson *v.* Poindexter, 12 *Wheaton*, 530.

Garcia *v.* Lee, 12 *Peters.*, 511.

M'Nair *v.* Ragland, 1 *Devereuc's Equity*, 516.

Orser *v.* Hoag, 3 *Hill*, 79.

Miller *v.* Gordon, 1 *Taylor*, 308.

Wilson *v.* Smith, 5 *Yerger*, 379.

Ware *v.* Highton, 3 *Dallas*, 199.

Hamyltons *v.* Eaton, *Martin*, 79.

Graham *v.* Pennsylvania, Ins. Co.

2 *Washington's C. C.*, 113.

Jackson *v.* Portor, *Paine*, 457.

The 'Amiable Isabella,' 6 *Wheaton*, 1.

Miller *v.* 'The Resolution,' *Bees. Adm.*, 404.

Anderson *v.* Lewis, 1 *Freeman's Chancery*, 178.

Stocton *v.* Williams, *Walker's Chancery*, 120.

¹ Sedgwick, *On Stat. and Con. Law*, ch. vi.; Bello, *Derecho Internacional*, pt. ii. cap. x.

CHAPTER IX

TREATIES OF PEACE

1. Peace the end and object of war—2. Power to make war does not necessarily imply that to make peace—3. Laws of different States—4. Power of a prisoner of war to treat—5. Alienation of territory and private property—6. Duty of compensation—7. Allies and associates, in regard to a treaty of peace—8. General character and effects of such treaty—9. Implied amnesty—10. New grievances from same cause—11. Claims unconnected with causes of the war—12. Principle of *uti possidetis*—13. Treaties of peace bind the whole State—14. When obligations commence—15. Upon individuals—16. Individuals liable for civil damages—17. Constructive and actual knowledge of peace—18. Recaptures after treaty of peace—19. In what condition things are to be restored—20. Unpaid military contributions—21. Effect of coercion on validity of treaty—22. Effect of peace on former treaties—23. Breach of a treaty of peace—24. Delays, &c., in carrying treaty into effect—25. War for new cause or for breach of treaty of peace.

Peace
the end
and object
of war

§ 1. IT has been laid down as 'an unquestionable proposition of international law that there is a legal as well as a moral necessity that, with the ceasing of the causes which justified the inception of the war, the war itself should cease.' Vattel enforces the obligation to seek peace as the end of war, and argues that no matter how just the war may have been at the commencement, it must not be continued beyond its lawful object, which is to procure justice and safety, and the moment an equitable compromise can be procured it should cease. The obligation to accept a peace *sufficiently safe* is also strenuously argued by Grotius. Other writers say that when, by use of the legal means of war, the invaded right has been obtained or secured, the injury redressed, or the threatened danger averted, the *abnormal* state of war *must* cease, and the *normal* state of peace *must* be re-established. Some, who advocate the general right of external intervention, deem it a most proper occasion to exercise that right, when a war, though lawfully begun, is unlawfully continued beyond the just objects of its inception. There are three ways by which a war may be concluded and peace restored : 1st. By the unconditional

submission of one belligerent to another ; 2nd. By a *de facto* cessation of hostilities, and a *de facto* renewal of the relations of peace, by both belligerents ; and 3rd. By a formal treaty of peace. We shall here discuss only the latter.¹

§ 2. The power to declare war does not necessarily include that of making a treaty of peace. These two powers are intimately connected, and the latter would seem naturally to follow the former. They are, therefore, generally associated together, though not always. In unlimited monarchies both reside in the sovereign ; and even in limited or constitutional monarchies both may be vested in the crown, yet the conditions of the treaty of peace may be such as to require its ratification by other authorities of the State. For, although the State may have entrusted to the prudence of her ruler the general authority to determine on war and peace, yet this power may be limited in many particulars by the fundamental law or constitution. A nation has the free disposal of its own domestic affairs and form of government, and its sovereign power of making war and peace may be entrusted to a single person, or it may be divided among a number of persons.

Powers to
make war
and peace
may be
distinct

§ 3. Thus, Francis I. of France attempted, by the treaty of Madrid, to cede to the emperor Charles V. the province of Burgundy ; but the States-General, under the constitution of the old French monarchy, declared that the king had no authority to alienate any part of the kingdom by a treaty of peace. The cession of the province of Burgundy was, therefore, annulled, as contrary to the fundamental laws of the kingdom. Under Richelieu and Louis XIV. the old feudal constitution of France was abolished, and all the powers of government concentrated in the hands of the king. Of the different constitutions established in France since the revolution of 1789, some have limited the power of concluding a peace, while others have vested it in the crown without any nominal limitation. Nevertheless, so long as the chambers

In the
United
States

¹ Vattel, *Droit des Gens*, liv. iv. ch. i. §§ 6, 7, 9 ; Grotius, *De Jure Bel. ac Pac.*, lib. iii. ch. xxv. § 3 ; Phillimore, *On Int. Law*, vol. iii. §§ 509 et seq. ; Bello, *Derecho Internacional*, pt. ii. cap. ix. § 6 ; Burlamaqui, *Droit de la Nat. et des Gens*, tom. v. pt. iv. ch. xiv. ; Albericus Gentilis, *De Legationibus*, lib. iii. cap. i. ; Zouch, *De Jure*, &c., pt. ii. sec. ix. ; Wolfius, *Jus Gentium*, cap. viii. ; Kampts, *Literatur des Völk.*, §§ 321, 331 ; Kent, *Com. on Amer. Law*, vol. i. p. 165 ; Wildman, *Int. Law*, vol. i. p. 139 ; Rayneval, *Inst. du Droit Nat.*, &c., liv. iii. ch. xxi. ; Heffter, *Droit International*, § 179.

exercise a legislative authority, they necessarily exercise an influence on the treaty-making power, in their right to refuse the passage of laws to carry such treaties into effect. In Great Britain the treaty-making power, as a branch of the prerogative of the crown, has, in theory, no limits ; but in the practical administration of the constitution this power is limited by the general controlling authority of parliament, which body can compel the crown to make peace by withholding the supplies necessary for carrying on the war, and its approbation is necessary to carry into effect a treaty by which the existing territorial arrangements of the empire are altered. In confederated governments, as already stated, the treaty-making power, and its extent, must depend upon the nature of the confederation and the formation and character of the government. By the constitution of the United States of America, the president has the exclusive power of making treaties of peace, which, when ratified with the advice and consent of the senate, become the supreme law of the land, and have the effect of repealing all other laws of congress, or of the States, which stand in the way of their stipulations. But congress may at any time compel the president to make peace by refusing the means of carrying on the war, and its approbation is necessary for the passage of any laws which might be required for carrying into effect the stipulations of such treaty.

May a
prisoner
of war
make a
treaty of
peace?

§ 4. A question much discussed in former times was, whether a prisoner of war can make a treaty of peace. On this subject Vattel remarks : ' Every legitimate government, whatever it may be, is established solely for the good and welfare of the State. This incontestable principle being once laid down, the making of peace is no longer the peculiar province of the king : it belongs to the nation. Now, it is certain that a captive prince cannot administer the government, or attend to the management of public affairs. How shall he, who is not free, command a nation ? How can he govern it in such a manner as best to promote the advantage of the people and the public welfare ? He does not, indeed, forfeit his rights ; but his captivity deprives him of the power of exercising them, as he is not in a condition to direct the use of them to its proper and legitimate end. He stands in the same predicament as a king in his minority, or labouring under a derangement of his mental faculties. Pope Clement VII.

refused to ratify a treaty with the Duke of Ferrara, which he had made when a prisoner, saying that it was a dishonourable thing for a man in life to ratify a matter done in his name when dead, not consistent with his honour and interest. Again, Francis I. excused himself from ratifying the treaty of Madrid on account of the inhumanity done to him by the permission of Charles V. In such circumstances it is necessary that the person or persons whom the laws of State designate for the regency, should assume the reins of government. To them it belongs to treat of peace, to settle the terms on which it shall be made, and to bring it to a conclusion, in conformity to the laws. The captive sovereign may himself negotiate the peace, and promise what personally depends on him ; but the treaty does not become obligatory on the nation till ratified by itself, or by those who are invested with the public authority during the prince's captivity, or, finally, by the sovereign himself after his release.'¹

§ 5. Another question of much greater practical difficulty is the limitation of the treaty-making power, expressed or implied, in the fundamental law or constitution of the State. The general authority to make treaties of peace, necessarily implies the power to stipulate the conditions of peace ; and among these may properly be involved the cession of the territory and other property of the State, as well as the right of sovereignty or *jus eminens* over private property. 'If, then,' says Wheaton, 'there be no limitation expressed in the fundamental laws of a State, or necessarily implied from the distribution of its constitutional authorities, on the treaty-making power in this respect, it necessarily extends to the alienation of public and private property, when deemed necessary for the national safety or policy.' 'There can be no doubt,' says Kent, 'that the power competent to bind the nation by treaty may alienate the public domain and property by treaty. If a nation has conferred upon its executive department, without reserve, the right of treating and contracting with other States, it is considered as having invested it with all the power necessary to make a valid contract. That department is the organ of the nation, and the alienations by it are valid, because they are done by the reputed will of the nation. The fundamental laws of a State may withhold from the executive department

Implied
power of
alienation
of
territory

¹ Vattel, *Droit des Gens*, lib. iv. ch. ii. § 13.

the power of transferring what belongs to the State ; but if there be no express provision of that kind, the inference is that it has confided to the department charged with the power of making treaties, a discretion commensurate with all the great interests, wants and necessities of the nation. A power to make treaties of peace necessarily implies a power to decide the terms on which they shall be made ; and foreign States could not deal safely with the government on any other presumption. The power that is entrusted generally and largely with authority to make valid treaties of peace, can, of course, bind the nation by alienation of part of its territory ; and this is equally the case, whether that the territory be already in the occupation of the enemy, or remains in the possession of the nation, and whether the property be public or private.' 'The right of making peace,' said Vattel, 'authorises the sovereign to dispose of things even belonging to private persons, and the eminent domain gives him this right.'¹

Duty of
compensation to
individuals

§ 6. With respect to the duty of the State to make compensation to individuals, and the limits to that duty, the remarks of Wheaton are peculiarly appropriate and just. 'The duty,' he says, 'of making compensation to individuals, whose private property is sacrificed to the general welfare, is inculcated by private jurists, as correlative to the sovereign right of alienating those things which are included in the eminent domain ; but this duty must have its limits. No Government can be supposed to be able, consistently with the welfare of the whole community, to assume the burden of losses produced by conquest, or the violent dismemberment of the State. Where, then, the cession of territory is the result of coercion and conquest, forming a case of imperious necessity beyond the power of the State to control, it does not impose any obligation upon the Government to indemnify those who may suffer a loss of property by the cession.' The history of the State of New York furnishes a strong illustration of this rule of public law. The people of the territory now composing the State of Vermont separated from New York and erected that territory into a separate and independent State. Individual citizens whose property would be sacrificed

¹ Vattel, *Droit des Gens*, liv. i. ch. xx. § 244 ; ch. xxi. § 262 ; liv. iv. ch. ii. §§ 11, 12 ; Kent, *Com. on Amer. Law*, vol. i. pp. 166, 167 ; Wheaton *Elem. Int. Law*, pt. iv. ch. iv. § 2.

by the event, claimed compensation of New York. The claim was rejected on the ground that the independence of Vermont was an act of force beyond the power of New York to control, and equivalent to a conquest of that territory.¹

§ 7. 'The principal party,' says Vattel, 'in whose name the war was made, cannot justly make peace, without including his allies.' The same author remarks that States which have been associated in a war, or have directly taken part in it, are respectively to make their treaty of peace each for itself; but that the alliance obliges them to retreat in concert. Such was the practice at Nimeguen, Rieswick, and Utrecht; at Vienna, in 1814, and at Paris, in 1856, the allies and associates in the wars concluded by these conventions, signed together treaties of peace. As associates in a war ally themselves together for the purpose of carrying on the war, it is right and proper that they should act in concert in making a treaty of peace. But as each engages in the war for himself and on his own responsibility, each should be allowed to make his own treaty of peace. To determine in what cases an associate in the war may detach himself from the alliance, and make his own separate and particular peace, is a question of difficult solution. Associations and alliances in war, as already stated, oblige the parties, as a general rule, to treat in concert. But if anyone should insist upon prosecuting the war beyond the object of the association, the others may very properly make peace for themselves. And anyone may make a separate peace for himself, if by so doing he does not violate his obligations, expressed or implied, toward his associates. His right to separate himself from his allies depends entirely upon the nature and object of the alliance, and the obligations he has incurred by joining others in the war against a common enemy.² The reiterated confirmations of the treaties of Westphalia³ and

Joint
treaty
of peace
by allies

¹ Wheaton, *suprà*.

² Vattel, *suprà*.

³ The peace of Westphalia was signed at Münster, October 24, 1648. It is a fundamental law of the Empire, and the basis of all subsequent treaties. In order to satisfy the different Powers, the following important stipulations were found necessary, viz. :—That France should possess the sovereignty of the three bishoprics (Metz, Toul, and Verdun), the city of Pignerol-Breisac and its dependencies, the territory of Suntgau, the landgraviates of Upper and Lower Alsace, and the right to keep a garrison in Philipsburg; that to Sweden should be granted, besides five millions of crowns, the archbishopric of Bremen and the bishopric of Verden secularised, Upper Pomerania, Stettin, the isle of Rügen and the city of

Utrecht¹ in almost every subsequent treaty of peace or commerce between the same parties constituted a sort of written code of conventional law, by which the distribution of power and territory among the principal European States was permanently settled until violently disturbed by the partition of Poland and the wars of the French Revolution.

General
character
of a treaty
of peace

§ 8. Every treaty of peace, according to Vattel, is nothing more than a compromise. Were strict and rigid justice to be insisted on, it would be impossible ever to make a treaty of

Wismar in the duchy of Mecklenburg, all to be holden as fiefs of the Empire with three votes at the Diet ; that the Elector of Brandenburg should be reimbursed for the loss of Upper Pomerania by the cession of the bishopric of Magdeburg secularised, and by having the bishoprics of Halberstadt, Minden, and Camin declared secular principalities with four votes at the Diet ; that the Duke of Mecklenburg, as an equivalent for Wismar, should have the bishoprics of Schwerin and Ratsburg erected in like manner into secular principalities ; that the electoral dignity with the Upper Palatinate should remain with Maximilian, Duke of Bavaria, and his descendants as long as they should produce male issue ; but that the Lower Palatinate should be restored to Charles Louis, in whose favour should be established an eighth electorate, to continue till the extinction of the House of Bavaria ; all the other princes and States were re-established in the lands, rights, and prerogatives which they enjoyed before the troubles of Bohemia in 1618 ; the Republic of Switzerland was declared to be a sovereign State, exempt from the jurisdiction of the Empire ; and the long-disputed succession of Cleves and Juliers with the restitution of Lorraine was referred to arbitration. The pacification of Passau was confirmed ; it was further agreed that the Calvinists should enjoy the same privileges with the Lutherans ; that the imperial chamber should consist of twenty-six Catholic members and twenty-four Protestants ; that the Emperor should receive six Protestants into his aulic council ; that an equal number of Catholic and Protestant deputies should be chosen for the Diet, except when it should be convoked for the regulation of points that might concern one only of the two religions ; that all the deputies should be Protestants if the objects of discussion should belong to their religion, and Catholics in the opposite case. (Russell, *Hist. Mod. Eur.*, ii. 195 ; Dumont, *Corps Diplomat.*, tom. vi. ; Pfeffel, *Abrégé Chronol.*)

¹ The Peace of Utrecht was signed on March 31, 1713. The principal articles, as between France and England, were that Louis should abandon the Pretender, acknowledge the Queen's title and the Protestant succession ; should raze the fortifications of Dunkirk, and should cede Newfoundland, Hudson's Bay, and St. Christopher's. With regard to the general objects of the alliance, it was agreed that the kingdom of Naples, the duchy of Milan, and the Spanish Netherlands should be assigned to the Emperor ; that the Duke of Savoy should possess Sicily with the title of king ; that Sardinia should be assigned to the Elector of Bavaria, with the same title ; that the States of Holland should receive Namur, Charleroy, Luxembourg, Ypres, and Nieuport, in addition to their other possessions in Flanders, but should restore Lisle and its dependencies ; and that the King of Prussia should exchange Orange, and the possessions belonging to that family in Franche-Comté, for Upper Gueldres. Great Britain was left in possession of Gibraltar and Minorca. (*The Student's Hume*, 577.)

peace. Not only the character of the original cause of the war would have to be determined, in order to settle the question as to which of the belligerents was in the wrong, but also all of the operations of the war itself, and the expenses incurred and damages suffered by each party. This would be impossible ; no other expedient, therefore, remains but to compromise all the claims and grievances on both sides, by a convention as fair and equitable as circumstances will admit of, all parties agreeing upon what terms their several pretensions are to be regarded as withdrawn or extinguished. The general effect of a treaty of peace is to put an end to the war, and to abolish the subject of it. 'It leaves the contracting parties,' says Vattel, 'without any right of committing hostility, either on account of the subject matter which gave rise to the war, or of anything that was done during its continuance ; therefore they cannot take up arms again for the same subject. Accordingly, in such treaties, the contracting parties reciprocally engage to preserve *perpetual peace*, which is not to be understood as if they promised never to make war on each other for any cause whatever. The peace in question relates to the war which it terminates ; and it is in reality perpetual, inasmuch as it does not allow them to renew the same war by taking up arms again for the same subject which had originally given birth to it.'

§ 9. It is the usual practice to introduce a leading article in a treaty of peace declaring an amnesty or a perfect oblivion of what is past ; but although the treaty should be silent on this subject, the amnesty is by the very nature of peace necessarily implied in it. A treaty of peace puts an end to all

It implies
an
amnesty

¹ Vattel, *suprà* ; the 'Eliza Ann,' 1 *Dods. R.*, 249 ; the 'Molly,' 1 *Dods. R.*, 396.

The last occasion on which hostages were given to secure a treaty was in 1748, for the Treaty of Aix-la-Chapelle. Some of the ancient treaties of alliance were recited to be made between king and king, subjects and subjects, such as this—'that there can be an universal and perpetual, true and sincere peace and amity between the most Christian king of France and the king of Great Britain, their heirs and successors, and between *the kingdoms, States, and subjects* of both.' (*Phil. Comines*, lib. ii. cap. 8.)

It has been said that if hostages are given to secure a treaty, he that gives them is freed from his promise or good faith, for the receiver of the hostages has relinquished the assurance of him who pledged his word.

A remarkable instance of the practice of securing a treaty by hostages occurred at the peace of Aix-la-Chapelle in 1748, when the restitution of Cape Breton, in North America, by Great Britain to France was secured by several British peers sent as hostages to Paris. (*Vattel*, liv. ii. ch. xvi. §§ 243-261.)

claims for indemnity for tortious acts committed during the war under the authority of one Government against the citizens or subjects of another, unless they are specially provided for in its stipulations. All personal complaints of losses sustained or injuries committed by subjects of the belligerent powers during the war are, as a general rule, silenced and extinguished by the treaty of peace. There are, however, certain exceptions to this rule, in cases where a valid claim may be subsequently made from peculiar transactions during the war, as in cases of ransom bills, of contracts made by prisoners of war for subsistence, and of trade carried on under a license. So, also, in cases of debts contracted, or injuries committed during the war by such belligerent subjects in a neutral country. In all these cases the remedy may be asserted subsequently to the peace. Although private rights existing before the war may not be remitted by a treaty of peace, the presumption is otherwise as to the rights of kings and nations.¹

New
griev-
ances
from same
cause

§ 10. But while a treaty of peace extinguishes the original subject of the war, it does not prevent new complaints from the same contested right. The grievances which originally kindled the war are settled, but new grievances arising from the same right or claim, may form a new cause of war, equally just with the former. The remarks of Wheaton and Kent on this point are clear and positive, and their language is almost identical with that of Vattel. 'The peace,' says Wheaton, 'relates to the war which it terminates; and is perpetual, in the sense that the war cannot be revived for the same cause. This will not, however, preclude the right to claim and resist, if the grievances which originally kindled the war be repeated,—for that would furnish a new injury, and a new cause of war, equally just with the former. If an abstract right be in question between the parties, on which the treaty of peace is silent, it follows that all previous complaints and injury arising under such claim are thrown into oblivion by the *amnesty*, necessarily implied, if not expressed; but the claim itself is not thereby settled either one way or the other. In the absence of express renunciation or recognition, it remains open for

¹ All complaints and grievances are intended to be buried in oblivion by a treaty of peace. If the same are not brought forward when peace is concluded, the presumption is that it is not intended to bring them forward afterwards. (The 'Molly,' 1 *Dods. R.*, 306.)

future discussion.' 'Peace,' says Kent, 'leaves the contracting parties without any right of committing hostility, for the very cause which kindled the war, or for what has passed in the course of it. It is, therefore, no longer permitted to take up arms for the same cause. But this will not preclude the right to complain and resist, if the same grievances which kindled the war be renewed and repeated, for that would furnish a new injury, and a new cause of war equally just with the former war. If an abstract right be in question between the parties, the right, for instance, to impress at sea one's own subjects, from the merchant vessels of the other, and the parties make peace without taking any notice of the question, it follows, of course, that all past grievances, damages, and injury, arising under such claim, are thrown into oblivion by the amnesty which every treaty implies, but the claim itself is not thereby settled either one way or the other. It remains open for future discussion, because the treaty wanted an express concession or renunciation of the claim itself.'¹

§ 11. A treaty of peace does not extinguish claims unconnected with the cause of the war. Debts, existing prior to the war, and injuries committed prior to the war, but which made no part of the reasons for undertaking it, remain entire, and the remedies are revived. 'The treaty of peace,' continues Wheaton, 'does not extinguish claims founded upon debts contracted, or injuries inflicted previously to the war, and unconnected with its causes, unless there be an express stipulation to that effect. Nor does it affect private rights acquired antecedently to the war, or private injuries unconnected with the causes which produced the war. Hence, debts previously contracted between the respective subjects, though the remedy for their recovery is suspended during the war, are revived on the restoration of peace, unless actually confiscated in the mean time, in the rigorous exercise of the strict rights of war, contrary to the milder practice of recent times.'

Claims
uncon-
nected
with
causes of
the war

§ 12. A treaty of peace leaves everything in the state in which it finds it, unless there be some express stipulations to the contrary. The existing state of possession is maintained, except so far as altered by the terms of the treaty. If nothing be said about the conquered country or places, they remain

Principle
of 'uti
possidetis'

¹ Wheaton, *Elem. Int. Law*, pt. iv. ch. iv. § 3 ; Kent, *Com. on Amer. Law*, vol. i. pp. 168, 169.

with the possessor, and his title cannot afterwards be called in question. The intervention of peace covers all defects of title, and vests a lawful possession in the purchaser, in the same manner as it quiets the title of the hostile captor himself. This general rule is applied, without exception, to personal property or real, and is called the principle of *uti possidetis*.¹

Treaty of
peace
binds the
whole
State

§ 13. Treaties of peace are equally valid, whether made with the authorities which declared the war, or with a new ruling power or *de facto* government. Other nations have no right to interfere with the domestic affairs of any particular nation, or to judge of the title of the party in possession of the supreme authority. They are to look only to the fact of possession, and the power conferred upon such authorities, by the then existing plan of government, or fundamental law. Treaties of peace, made by the competent authorities of such governments, are obligatory upon the whole nation, and, consequently, upon all succeeding governments, whatever may be their character. 'If the treaty requires the payment of money, to carry it into effect,' says Kent, 'and the money cannot be raised but by an act of the legislature, the treaty is morally obligatory upon the legislature to pass the law, and to refuse it would be a breach of public faith. The department of the government that is intrusted by the constitution with the treaty-making power is competent to bind the national faith in its discretion ; for the power to make treaties of peace must be co-extensive with all the exigencies of the nation, and necessarily involves in it that portion of the national sovereignty which has the exclusive direction of diplomatic regulations and contracts with foreign powers. All treaties made by that power become of absolute efficacy, because they are the supreme law of the land.'²

When its
obliga-
tions
commence

§ 14. A treaty of peace binds the contracting parties from the moment of its conclusion, unless otherwise provided in the treaty itself. Hence, all hostilities are to cease from the time that the belligerent powers are restored to the normal relations of peace, and no rights of war can be subsequently acquired, or (properly speaking) exercised by the parties to the treaty. It also follows, that if the territory be ceded by such treaty,

¹ Mably, *Droit de l'Europe*, tom. i. ch. ii. p. 144 ; the 'Foltina,' 1 *Dods. R.*, 452 ; and see *post.*, ch. xvii.

² Kent, *Com. on Amer. Law*, vol. i. pp. 165, 166.

the ceding sovereignty can exercise no authority in the ceded territory, after the conclusion of the treaty, except for municipal purposes, and any grants of land, or of franchises to be enjoyed in the territory so ceded, are utterly null and void. But when is the treaty to be considered as concluded (in the absence of any stipulation on this point), at the time of its signature, or of its ratification? Upon this question there is some difference of opinion, although the weight of authority is, that no public treaty begins to operate till it has passed through all the necessary forms and been ratified. It may have a retroactive effect, and relate back to the time of signing, if so provided in the treaty itself, but not otherwise; so, also, the time when it begins to operate may be postponed to a date subsequent to its ratification, but not unless it is so specially provided in the treaty. But the act of ratification may operate with retrospective effect, to confirm the treaty according to the terms of its provisions.¹

§ 15. Although a treaty of peace binds the governments of the contracting powers from the moment of its conclusion (unless otherwise provided), so that no belligerent right can afterward be lawfully exercised, it does not affect the citizens or subjects of such powers so as to render them *criminally* responsible, and liable to punishment for acts of hostility, till they have actual or constructive knowledge of the peace. The treaty is a law to the subjects of the contracting parties, by which their relations to each other are changed; and no one is punishable for the breach of a law till it is promulgated. A seizure *jure belli* made in time of peace is a wrongful act, and the injured party is entitled to restitution, and the government of the captor is bound to repair the wrong which was committed, through ignorance, by its subject; but the subject is not affected with *guilt* by reason of acts of hostility subsequent to the date of the treaty of which he had not been notified. In order to guard against inconveniences from the want of due knowledge of a treaty of peace, it is usual to fix

Criminal
responsi-
bility of
indi-
viduals

¹ Wheaton, *Elem. Int. Law*, pt. iv. ch. iv. § 5; Phillimore, *On Int. Law*, vol. iii. § 517; Pando, *Derecho Púb. Int.*, p. 583; *Hylton v. Brown*, 1 *Wash. R.*, 312; *Baine et al. v. schooner 'Speedwell'*, 2 *Dallas R.*, 40; *the United States v. Reynes*, 9 *Howard R.*, 127; *Davis v. the Police Jury, &c.*, 9 *Howard R.*, 208; *the 'Elsebe'*, 5 *Rob.*, 189; *the 'Eliza Anne'*, 1 *Dods. R.*, 244; Riquelme, *Derecho Púb. Int.*, lib. i. tit. i. cap. xiii.; Bello *Derecho Internacional*, pt. ii. cap. ix. § 6.

the periods at which hostilities are to cease at different places, and between different lines of latitude and longitude upon the high seas, and also to provide for the restitution of all property taken at such places after the peace went into operation, but by parties acting in ignorance of it.

Civil re-
sponsi-
bility for
damages

§ 16. But while all agree that individuals are not *criminally* responsible for acts of hostility committed after the date of the peace, so long as they are ignorant of it, there seems to be a difference of opinion among publicists whether they are responsible *civiliter* in such cases. Grotius says they are not liable to answer in damages, but it is the duty of the government to restore what has been captured and not destroyed. 'But the latter opinion seems to be,' says Wheaton, 'that wherever a capture takes place at sea, after the signature of the treaty of peace, mere ignorance of the fact will not protect the captor from civil responsibility in damages; and that if he acted in good faith, his own government must protect him and save him harmless. When a place or a country is exempted from hostility by articles of peace, it is the duty of the State to give its subjects timely notice of the fact, and it is bound in justice to indemnify its officers and subjects who act in ignorance of the fact. In such a case it is the actual wrong-doer who is made responsible to the injured party, and not the superior commanding officer of the fleet, unless he be on the spot, and actually participating in the transaction. Nor will damages be decreed by the prize court, even against the actual wrong-doer, after a lapse of a great length of time.' The case of the American ship 'Mentor,' which was taken and destroyed off Delaware Bay, by British ships of war, in 1783, after the cessation of hostilities, but before the fact had come to the knowledge of either of the parties, has given rise to much discussion. The opinion of Sir William Scott in that case forms the substance of the foregoing remarks of Mr. Wheaton. This claim against Admiral Digby was decided in 1799. A claim had previously been made against the actual wrong-doer, and rejected by the English prize court. In discussing this case Chancellor Kent remarks: 'It would seem from that case that the American owner was denied redress in the British admiralty, not only against the admiral of the fleet on that station, but against the immediate author of the injury. Sir William Scott denied the relief against the admiral, and ten

years before that time, relief had equally been denied by his predecessor, against the person who did the injury. If that decision was erroneous, an appeal ought to have been presented. We have then the decision of the English high court of admiralty, denying any relief in such a case, and an opinion of Sir William Scott, many years afterwards, that the original wrong-doer was liable. The opinions cannot otherwise be reconciled, than upon the ground that prize courts have a large and equitable discretion, in allowing or withholding relief, according to the special circumstances of the individual case ; and that there is no fixed or inflexible and general rule on the subject.'¹

§ 17. When the treaty of peace contains an express stipulation that hostilities are to cease in a given place at a certain time, and a capture is made previous to the expiration of the period limited, but with a knowledge of the peace on the part of the captor, it has been a question among writers on public law whether the captured property should be restored. 'The better and more reasonable opinion is,' says Kent, 'that the capture would be null though made before the day limited, provided the captor was previously informed of the peace ; for, as Emerigon observes, since constructive knowledge of the peace, after the time limited in different parts of the world, renders the capture void, much more ought actual knowledge of the peace to produce that effect.' Wheaton coincides in this view, but remarks that it may be questionable whether anything short of an official notification from his own Government would be sufficient, in such a case, to affect the captor with the legal consequences of actual knowledge. This point was extensively discussed in the French prize courts, in the case of the capture of the British ship 'Swineherd' by the French privateer 'Bellona' in 1801, but the particular case was decided on the ground that the king's proclamation of peace was unaccompanied by any French attestation, and was not that sufficient and indubitable evidence to the French cruiser of the fact of peace, upon which he ought to have acted ?²

§ 18. Another question has arisen with respect to the

¹ Kent, *Com. on Amer. Law*, vol. i. p. 171 ; Wheaton, *Elem. Int. Law*, pt. iv. ch. iv. § 5 ; the 'Mentor,' 1 *Rob.*, 179.

² Kent, *suprà* ; Emerigon, *Traité d'Assurance*, ch. xii. § 19.

Recapture
after
treaty of
peace

validity of a recapture of a prize, after peace, but without a knowledge of it, and before the prize had been carried *infra præsidia*, and condemned. In the case of a British vessel captured by an American privateer during the war, and recaptured while at sea by a British ship of war, after peace by the treaty of Ghent in 1814, but in ignorance of it, it was decided in a British Vice-Admiralty Court that the possession of the vessel by the American privateer was a lawful possession, and that the British cruiser could not, after the peace, lawfully use force to divest this lawful possession. The restoration of peace put an end, for the time limited, to all force, and then the general principle applied, that things acquired in war remain, as to title and possession, precisely as they stood when the peace took place.¹

In what
condition
things are
to be
restored

§ 19. Things stipulated to be restored by the treaty are to be restored in the condition in which the treaty found them, unless there be an express stipulation to the contrary. A fortress or town is, therefore, to be restored as it was when taken, so far as it still remains in that condition when the peace is concluded. There is no obligation to repair a dismantled fortress, nor to restore the former condition of a territory which has been ravaged by the operations of war. 'On the other hand, to dismantle a fortification or to lay waste a country after the conclusion of peace, would be an act of perfidy. A conqueror may, however, demolish new works constructed by himself, but not repairs made by him in old works which he himself had injured during the war. The remarks of Vattel on this subject have been approved and adopted by subsequent writers: 'Those things,' he says, 'of which the restitution is, without further explanation, simply stipulated in the treaty of peace, are to be restored in the same state in which they were taken; for the word *restitution* naturally implies that everything should be replaced in its former condition. Thus, the restitution of a thing is to be accompanied with that of all the rights which were annexed to it when taken. But this rule must not be extended to comprehend those changes which may have been the natural consequences and effects of the war itself and of its operations.' The products of things restored or ceded by the treaty

¹ The 'Legal Tender,' cited *Wheat. Dig.*, 302; the 'Sophie,' 6 *Rob.*, 138.

of peace are due from the time the restoration or cession of the things themselves takes effect or is due. But all products which were due or collected prior to the date of the restitution or cession, are not to be delivered up, unless otherwise specially stipulated in the treaty, for the fruits belong to the proprietor of the thing, and the possession of things taken in war is accounted a lawful title, subject, however, to the conditions of peace. 'For the same reason,' says Vattel, 'the cession of a fund does not imply that of the produce anteriorly due. This Augustus justly maintained against Sextus Pompeius, who, on having the Peloponnesus given to him, claimed the imposts of the former years.'¹

§ 20. The same rule is laid down by Vattel, with respect to contributions levied upon the territory or inhabitants ceded or restored by the treaty of peace. 'To raise contributions,' he says, 'is an act of hostility, which, on the conclusion of peace, is to cease. Those before promised, and not yet paid, are due, and may be required as a debt. But, in order to obviate all difficulty, it is proper that the contracting parties should clearly and minutely explain their intentions respecting matters of this nature; and they are generally careful to do so.' But the correctness of the rule, as thus applied to territory restored by the treaty, may very well be doubted. There is a broad distinction between *military* and *civil* rights; the latter are acquired by contract, conveyance, or other *title*, and are evidenced by the ordinary proofs of *title*; while the former are acquired by capture or conquest, and are evidenced by *possession* alone—they begin and end with possession. If the conquest is restored by the treaty of peace, the right of possession is terminated, and with it all the incidental rights of military occupation, such as the right of levying and collecting military contributions. The principle of *uti possidetis* being the basis of every treaty of peace, unless otherwise specially provided in the treaty itself, it follows that the conqueror (the treaty being silent on this point) is entitled to all the contributions which he has collected, by the right of military occupation of the belligerent territory now surrendered; but not to those which he has levied but failed to collect. His rights over the inhabitants of such territory are *military* rights, and, consequently, terminate with the right of pos-

Unpaid
military
contribu-
tions

¹ Vattel, *Droit des Gens*, liv. iv. ch. iii. § 30.

session, *i.e.* with the treaty of peace which restores the conquest.¹

Breach of
a treaty
of peace

§ 21. We have already spoken of the general obligations of a treaty of peace, and have shown that when made by competent authority, it is binding upon the whole State. The question has been raised, how far the plea, that the treaty of peace was obtained through intimidation, or extorted by force, may dispense with its observance. Vattel says that such a plea will not invalidate a treaty, or dispense with its observance : 'First, were this exception admitted, it would destroy, from the very foundations, all the security of treaties of peace ; for there are few treaties of that kind which might not be made to afford such a pretext as a cloak for the faithless violation of them.' But according to the opinion of the same author, there may be exceptions to this rule, as in the case of a forced submission to conditions equally offensive to justice and to all the duties of humanity. If a rapacious and unjust conqueror subdues a nation and forces her to accept hard, ignominious, and insupportable conditions, necessity obliges her to submit ; but this apparent tranquillity is not a peace : it is an oppression which she endures only so long as she wants the means of shaking it off, and against which men of spirit rise on the first favourable opportunity. When Fernando Cortes attacked the empire of Mexico, without any shadow of reason, without even a plausible pretext, if the unfortunate Montezuma could have recovered his liberty by submitting to the iniquitous and cruel conditions of receiving Spanish garrisons into his towns and his capital, of paying an immense tribute, and obeying the commands of the king of Spain, will any man pretend to assert that he would not have been justifiable in seizing a convenient opportunity to recover his rights, to emancipate his people, and to expel or exterminate the Spanish horde of greedy, insolent, and cruel usurpers? No! such a monstrous absurdity can never be seriously maintained. Although the law of nature aims at protecting the safety and peace of nations by enjoining the faithful observance of promises, it does not favour oppressors.²

¹ Vattel, *suprà* ; vide *post.*, chs. xxxiii. and xxxiv.

² Vattel, *Droit des Gens*, liv. iv. ch. iv. § 37. It is to be feared that this just censure must be shared by many other nations ; and the dealings

§ 22. A treaty of peace may revive former treaties by express stipulation, or, in certain cases, without any stipulation whatever. As a general rule, the obligations of treaties are dissipated by war, and they are regarded as extinguished and gone for ever, unless expressly revived by the treaty of peace. But this rule is by no means universal. 'Where treaties contemplate a permanent arrangement of national rights,' says Kent, 'or which, by their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. They revive at peace, unless waived, or new and repugnant stipulations be made.'¹

Revival
of former
treaties

§ 23. 'The breach of a treaty of peace,' says Vattel, 'consists in violating the engagements annexed to it, either by doing what it prohibits, or by not doing what it prescribes. Now, the engagements contracted by treaty may be violated in three different ways—by a conduct that is repugnant to the nature and essence of every treaty of peace in general—by proceedings which are incompatible with the particular nature of the treaty in question—or, finally, by the violation of any article expressly contained in it.' These different modes by which a treaty of peace may be violated, are discussed by Vattel at considerable length. We shall allude here only to the last, that is, how far the breach of a single article is a breach of the whole treaty. The violation of any one article of a treaty of peace abrogates the whole treaty, if the injured party so elects to consider it; for all the articles are dependent on each other, and one is to be deemed a condition of the other. It is sometimes, however, expressly stipulated that if one article be broken, the others shall nevertheless be continued in force. But, without such stipulation, the injured party may regard the violation of a single article as overthrowing the whole treaty. 'We have a strong instance in our own history,' says Kent, 'of the annihilation of treaties by the act of the injured party. In 1798, the congress of the United States declared that the treaties with France were no longer obligatory on the United States, as they had been re-

of the United States with the Red Indian tribes show that her administration is not always animated by Vattel's benevolent sentiments.

Breach of
treaty of
peace

¹ Kent, *Com. on Amer. Law*, vol. i. p. 177; *Sutton v. Sutton*, 1 *Russ. and M.*, 663; the *Society for the Propagation of the Gospel v. 'New Haven'*, 8 *Wheat. R.*, 494.

peatedly violated on the part of the French government, and all just claims for reparation refused.' Publicists very properly distinguish between a void and a voidable treaty. If the treaty be violated by one of the contending parties, either by proceedings incompatible with its general spirit, or by a specific breach of any one of its articles, it becomes not absolutely void, but voidable at the election of the injured party. If he prefers not to come to a rupture, the treaty remains valid and obligatory. He may waive or remit the infractions committed, or he may demand a just satisfaction.¹

Delays,
&c., in
carrying
treaty
into
effect

§ 24. Affected delays in performing the conditions of a treaty of peace, are, says Vattel, equivalent to an express denial, and differ from it only by the artifice with which he who practises them seeks to palliate his want of faith ; he adds fraud to perfidy, and actually violates the article which he should fulfil. But, if a real impediment stands in the way, time must be allowed, for no one is bound to perform impossibilities. If the obstacle be utterly insurmountable, the other party should accept an indemnification, if the case will admit of it, and the indemnification be practicable. But if no equivalent can be offered, the intervening impossibility undoubtedly cancels the particular obligation.²

War for
new cause
or for
breach
of peace

§ 25. 'There is,' says Kent, 'a very material and important distinction made by the writers on public law, between a new war for some new cause, and a breach of a treaty of peace. In the former case, the rights acquired by the treaty subsist, notwithstanding the new war ; but in the latter case, they are annulled by the breach of the treaty of peace, on which they were founded. A new war may interrupt the exercise of the rights acquired by the former treaty, and like other rights, they may be wrested from the party by the force of arms. But then they become newly acquired rights, and partake of the operation and result of the new war. To recommence a war by breach of the articles of a treaty of peace, is deemed much more odious than to provoke a war by some new demand and aggression ; for the latter is simply injustice, but, in the former case, the party is guilty both of perfidy and injustice.'³

¹ Vattel, *suprà* ; Kent, *Com. on Amer. Law*, vol. i. p. 175.

² Vattel, *Droit des Gens*, liv. iv. ch. iv. §§ 50, 51.

³ Kent, *Com. on Amer. Law*, vol. i. p. 175 ; the schooner 'Sophie,' 6 Rob., 143 ; Moser, *J. J. Vermecht Abhandl.*, No. 1.

CHAPTER X

RIGHTS AND DUTIES OF PUBLIC MINISTERS

1. Establishment of permanent legations—2. Distinction of diplomatic agents—3. Modern classification—4. Ambassadors, legates and nuncios—5. Envoys and ministers plenipotentiary—6. Ministers and ministers resident—7. Chargés d'affaires—8. Secretaries of embassy and legation—9. Attachés and the families of ministers—10. Messengers and couriers—11. Domestics and servants—12. General immunities of public ministers—13. Exemption from local jurisdiction—14. In case of plotting against local government—15. In case of owing allegiance—16. In case of voluntary submission to local jurisdiction—17. Extent of such civil jurisdiction—18. Extent of such criminal jurisdiction—19. Public ministers, how punished—20. Their dependents, how punished—21. Testimony of ministers, how taken—22. Exemption of minister's house and personal effects—23. His real estate and private personal property—24. Of taxes and duties—25. Freedom of religious worship—26. Letters of credence—27. Full power to negotiate—28. The minister's instructions—29. Notification of his appointment—30. Presentation and reception—31. His passports and safe-conduct—32. Passage through other States—33. Termination of public missions—34. By death of minister—35. By his recall—36. By expiration of term, or by promotion—37. By change of government—38. Dismissal of a public minister—39. Duty of respect to local authorities.

§ 1. WE will now consider the rights and duties of the various agents which are usually employed in diplomatic intercourse. Per-
manent
legations The rights of public ambassadors were known and recognised by the classic nations of antiquity,¹ and were, in some degree, though less generally, respected during the middle ages. The increasing interest of different States in each other's affairs, in modern times, growing out of more extensive commercial and political relations, and the vast improvements in the means of intercourse between the citizens of different countries, has rendered expedient and necessary the institution of resident permanent legations at each other's courts. 'There is no circumstance,' says Wheaton, 'which marks more distinctly the progress of modern civilisation, than the institution of permanent diplomatic missions between different States.

¹ As to ambassadors among the Jews, see 1 Chron. ch. xix.

The establishment of these permanent legations is generally dated from the peace of Westphalia, in 1648.¹

No distinction
in ancient
times

§ 2. The primitive law of nations made no distinction between the different classes of public ministers ; but the increase in their number and duties, in modern times, has led to numerous distinctions in the name and rank of the different public agents, as well as in the rights which pertain to their respective offices. The distinctions thus introduced into the voluntary law of nations, by the modern usages of Europe and America, have, at times, for the want of exact definition, become the source of serious controversies ; but this usage, as modified and explained by conventions and diplomatic discussions, has at last established a more uniform, though not entirely definite, rule on this subject, which has become incorporated into the international code, as a law by which the rights and duties of each may be sufficiently ascertained.²

Modern
classification

§ 3. The modern classification, as adopted by the Congress of Vienna in 1815, and that of Aix-la-Chapelle in 1818, and which, with little variation, has been subsequently followed, is based on the power and authority conferred on the agent by his own government. The first and highest rank is given to those who *represent* the sovereign or State by whom they are delegated ; the second rank to *envoys* not invested with the representative character, but who are sent for particular purposes, and have conferred on them special powers ; third, to ministers *resident* at a foreign Court, not for any specified object, but performing such duties and exercising such powers as their sovereigns may direct or confer on them ; fourth, to agents of a rank subordinate to ministers *charged* by their own governments with the performance of certain diplomatic duties in a foreign country. There are, also, connected with

¹ Wheaton, *Elem. Int. Law*, pt. iii. ch. i. § 1 ; Vattel, *Droit des Gens*, liv. iv. ch. v. §§ 55-65 ; Horne, *On Diplomacy*, sec. i. ; Phillimore, *On Int. Law*, vol. ii. §§ 148-151, 211-213 ; Ward, *Hist. Law of Nations*, vol. ii. p. 413 ; Heffter, *Droit International*, § 199 ; Miruss, *Das Europ. Gesandtschaftsrecht*, § 89 ; Kluber, *Europ. Völkerrecht*, § 170 ; Wildman, *Int. Law*, vol. i. ch. iii. ; Bello, *Derecho Internacional*, pt. iii. cap. i. § 1 ; Riquelme, *Derecho Púb. Int.*, lib. ii. cap., Ad. i.

² Kluber, *Acten des Wiener Cong.*, 1814 and 1815 ; Burlamaqui, *Droit de la Nat. et des Gens*, tom. v. pt. iv. ch. xv. ; Merlin, *Répertoire*, verb. 'Ministre Public,' sec. i. ; Grotius, *De Jure Bel. ac Pac.*, lib. ii. cap. xviii. § 10 ; Bynkershoek, *De Foro Legat.*, cap. vi. ; Zouch, *De Leg. de Jud.*, p. 139 ; Wicquefort, *L'Ambassadeur et ses Fonctions*, lib. i. §§ 818-838.

nearly every legation, certain secretaries, attachés, messengers, &c., to whom the usage of nations has given certain privileges and exemptions, while in a foreign State. We shall here consider these public officers in a foreign country, in the following order : first, ambassadors ; second, envoys and ministers plenipotentiary ; third, ministers resident ; fourth, chargés d'affaires ; fifth, secretaries of legation ; sixth, attachés and the families of ministers ; seventh, messengers, couriers, domestic servants, &c.

§ 4. Every public minister, in some measure, represents the State or sovereign by whom he is sent, as an agent represents his constituent ; but an *ambassador* is considered as peculiarly representing the honour and dignity of his principal, and, if the representative of a monarchical government, he has been regarded as entitled to the dignity and exact ceremonial of one representing the person of his sovereign. The terms *ordinary* and *extraordinary* are applied to designate the time of their intended residence and employment, whether for an indeterminate period, or only for a particular or extraordinary occasion. In Europe, the right of sending ambassadors is considered as exclusively confined to crowned heads, to the great Republics, and to other States entitled to royal honours.¹ Papal legates, or nuncios, at Catholic courts are usually ranked as ambassadors.

§ 5. Envoys and other public ministers not invested with the peculiar character which is supposed to be derived from representing generally the dignity of the State or the person of the sovereign, come next in rank to ambassadors. They represent their principal only in respect to the particular business committed to their charge at the court to which they are accredited. They are variously named, as envoys, envoys extraordinary, and ministers plenipotentiary, and internuncios

¹ It is said that if a viceroy send an ambassador, it is high treason ; therefore Queen Elizabeth refused to receive a minister of State sent by the Duke of Alva, Governor of Flanders, because he was not provided with credentials from the King of Spain. Again, the trumpeter sent by the Maid of Orleans to the Earl of Suffolk was not accorded the immunities usually attached to that duty, because the person sending him was not a sovereign, nor one capable of sending a trumpeter. (Grimston, *Hist. of France*, 326.) The Electors and Princes of Germany had the privilege of sending and receiving ambassadors, concerning the affairs of their own territories, but not concerning those of the Empire. The Hanse Towns likewise possessed this privilege, either by prescription or by grant of the Emperors.

of the Pope.¹ Martens says : ' A distinction is made between the envoy and the envoy extraordinary, and between the envoy extraordinary and the plenipotentiary. But these distinctions have no influence with regard to precedence.'²

Ministers,
&c.

§ 6. In the third class are included ministers, ministers resident, residents, and special ministers charged with a particular business, and accredited to sovereigns. Vattel thus distinguishes between a minister resident, and one called simply minister, and gives us the origin of the name : ' The word *resident* formerly only related to the continuance of the minister's stay, and it is frequent in history for ambassadors in ordinary to be styled only residents. But since the establishment of different orders of ministers, the name of resident has been limited to ministers of a third order, to the character of which general practice has annexed a lesser degree of regard. The resident does not represent the prince's person in his dignity, but only his affairs.' . . . ' Lastly, a custom still more modern has erected a new kind of ministers, without any particular determination of character. These are called simply *ministers*, to indicate that they are invested with the general quality of a sovereign's mandatories, without any particular assignment of rank and character. It was likewise the punctilio of ceremony which gave rise to this novelty. Use had established distinct treatment for an ambassador, an envoy, and a resident. Difficulties betwixt ministers of the several princes often arose on this head, and especially about rank. In order to avoid all contests on certain critical occasions, when they might be apprehended, it has been judged proper to send ministers, without giving them any of these known characters ; such are not subjected to any settled ceremony, and can pretend to no particular treatment. The minister represents his master in a vague and indeterminate manner, which cannot be equal to the first degree, and consequently makes no difficulty in yielding to an ambassador.

¹ The States still actually represented at the Vatican are : Austria and Hungary, Spain, France, and Portugal, who have each an ambassador at Rome ; Bavaria, Belgium, Bolivia, Brazil, Ecuador, Chili, Guatemala, Monaco, the Republic of Nicaragua, Peru, and the Republic of San Salvador, who maintain a minister plenipotentiary. Germany has retained a chancellor. Holland has no minister accredited to the Holy See, but an internuncio continues to reside at the Hague. (Nys on the *Papacy*, p. 4.)

² Martens, *Guide Diplomatique*, §§ 8, 14.

He is entitled to the general regard of a person of confidence to whom the sovereign commits the care of his affairs, and he has all the rights essential to the character of a public minister.' ¹

§ 7. *Chargés d'affaires*, near the courts of the monarchical Governments of Europe, are not accredited to the sovereigns, but to the ministers of foreign affairs. They are divided into two classes, according to the nature and object of their appointments, viz., *chargés d'affaires ad hoc*, who are originally sent and accredited by their Governments in that capacity, and *chargés d'affaires per interim*, who are substituted in the place of the minister of their respective nations during his absence. ²

§ 8. The secretaries of embassy and legation are especially entitled, as official persons, to the privileges of the diplomatic corps in respect to their exemption from local jurisdiction. ³ 'The ambassador's secretary,' says Vattel, 'is one of his domestics; but the secretary of the embassy has his commission from the sovereign himself, which makes him a kind of public minister, and he, in himself, is protected by the law of nations, and enjoys immunities independent of the ambassador, to whose orders he is indeed but imperfectly subjected, sometimes not at all, and always according to the determination of their common master.' ⁴

§ 9. The attachés, and the wife and family of a minister, participate in the inviolability attached to his public character. 'The persons in an ambassador's retinue,' says Vattel, 'partake of his inviolability; his independency extends to all his household; these persons are so connected with him that they follow his fate. They depend immediately on him only, and are exempt from the jurisdiction of the country into which they would not have come, but with this reserve. The ambassador is to protect them, and whenever they are insulted, it is an insult to himself. . . . The ambassador's consort is intimately united to him, and more particularly belongs to

¹ Vattel, *Droit des Gens*, liv. iv. ch. vi. § 73.

² Webster, *To Amer. Chargé d'Affaires at Vienna*, June 8, 1852; Maillardière, *Précis du Droit des Gens*, p. 330; Phillimore, *On Int. Law*, vol. ii. § 220; Klüber, *Droit des Gens Mod.*, § 182; Martens, *Guide Diplomatique*, § 15.

³ *Ex parte Cabrera*, 1 Wash. C. C., 232.

⁴ Vattel, *Droit des Gens*, liv. iv. ch. ix. § 122. *An agent* has not the privilege of legation unless he be accredited.

him than any other person of his household. Accordingly, she shares his independency and inviolability; even distinguished honours are paid her, which in some measure could not be denied her without affronting the ambassador. For these, most courts have a fixed ceremonial. The regard due to the ambassador communicates itself likewise to his children, who also partake of his immunities.' ¹

Messen-
gers and
couriers

§ 10. 'The practice of nations,' says Wheaton, 'has also extended the inviolability of public ministers to the messengers and couriers sent with dispatches to or from the legations established in different countries. They are exempt from every species of visitation and search, in passing through the territories of those powers with whom their own government is in amity. For the purpose of giving effect to this exemption, they must be provided with passports from their own Government, attesting their official character; and, in case of dispatches sent by sea, the vessel, or *aviso*, must also be provided with a commission or pass. In time of war, a special agreement, by means of a cartel or flag of truce, with passports, not only from their own Government, but from its enemy, is necessary for the purpose of securing these dispatch vessels from interruption, as between the belligerent powers. But an ambassador, or other public minister resident in a neutral country, for the purpose of preserving the relations of peace and amity between the neutral State and his own Government, has a right freely to send his dispatches in a neutral vessel, which cannot lawfully be interrupted by the cruisers of a power at war with his own country.' On this subject Vattel very justly remarks: 'Couriers sent or received by an ambassador, his papers, letters, and dispatches, all essentially belong to the embassy, and are consequently to be held sacred; since, if they were not respected, the legitimate objects of the embassy could not be attained, nor would the ambassador be able to discharge his functions with the necessary degree of security.' The states-general of the United

¹ See also § 25. Toucey, *Opinions U. S. Attys.-Genl.*, vol. v. p. 69; Merlin, *Répertoire*, verb. 'Ministre Public,' sec. vi.; Vattel, *suprà*.

The 13 and 14 Vict., c. 3 (private Act), passed in 1850, enables the Minister of the King of Prussia in Great Britain to purchase a residence in London for the use of the Prussian Legation, and regulates the future holding of the same. The residence is held in trust for the King of Prussia, his successors and assigns.

Provinces decided, whilst the president Jeannin resided with them as ambassador from France, that, to open the letters of a public minister is a breach of the law of nations. Other instances may be seen in Wicquefort. That privilege, however, does not, on certain momentous occasions, when the ambassador himself has violated the law of nations by forming or countenancing plots or conspiracies against the State, deprive us of the liberty to seize his papers for the purpose of discovering the whole secret and detecting his accomplices ; since, in such an emergency, the ambassador himself may lawfully be arrested and interrogated. An example is furnished us in the conduct of the Roman Government, who seized the letters which a treasonable junto had committed to the hands of Tarquin's ambassador.¹

§ 11. The domestics and servants of a minister also participate in the inviolability attached to his public character. Domestics
and
servants
'Did not the domestics,' says Vattel, 'and household of a foreign minister solely depend on him, it is known how very easily he might be molested and disturbed in the exercise of his functions.' But as this exemption of persons of this class sometimes leads to difficulties with the local police, the municipal laws of some States, and the usage of most nations, now require an official list² of the domestic servants of foreign ministers to be communicated to the secretary or minister of foreign affairs, in order to entitle them to any of the privileges or exemptions pertaining to them by virtue of their being dependents of a foreign embassy or legation. It was at one time contended that the subjects of the State to which a public minister is accredited, do not participate in his rights of extritoriality, but are justiciable by the tribunals of their country. But the better opinion seems to be that, although such State may very properly prohibit its subjects from becoming the employés or servants of a foreign minister, if it do not so prohibit them, they are, while so employed, to be considered without the limits of its jurisdiction.

It must be observed that the minister himself can afford no 'protection ;' it is the law which gives a public character to his family, domestics and servants. Hence, a mere appoint-

¹ Wheaton, *Elem. Int. Law*, pt. iii. ch. i. § 19 ; Vattel, *suprà* ; the 'Caroline,' 6 *Rob.*, 460 ; the 'Atalanta,' 6 *Rob.*, 441.

² See *Heathfield v. Chilton*, 4 *Burr.*, 2016, as to this registration in England.

ment by a minister of any person as a member of his household, is, in itself, no protection to such person.¹ It must be shown that he is *bond fide* the officer or servant of such household, and that he performs the duties corresponding to the position or office which he pretends to hold. A court will inquire if his appointment is a fair *bond fide* transaction, and if not, the privilege claimed will not be allowed. The same may be said of the goods of persons claiming such privilege; if they are not *bond fide* members of such household, or are engaged in other business or trade, their goods are not exempt from process for debts, rents, &c. Ministers have not unfrequently attempted to protect the persons and property of their friends from arrest or attachment, or execution, by pretended appointments to positions in their household, but the courts have very properly refused to give any countenance to such frauds.²

Inviolability of ministers

§ 12. The act of sending a minister by the one, and of receiving him by the other, amounts to a tacit compact between the two States, that he shall be subject only to the authority of his own government. The inviolability of the minister is founded upon mutual utility, growing out of the necessity that such officers and agents should be entirely independent of the local authority, in order to properly fulfil the duties of their mission. Hence, the fiction of *extra-territoriality* has been invented, by which the minister, though actually in a foreign country, is considered still to remain within the territory of his own State. He continues subject to the laws of his own country, both with respect to his personal *status*, and his rights of property; and his children, though

¹ A domestic physician is not protected by an ambassador's retainer (Lockwood *v.* Dr. Coysgarne, 3 *Burr.*, 1676); and, in 1641, Cuthbert Clapton was accused of being a 'Popish priest,' and was condemned to death, although he pleaded that he was interpreter to the Venetian Ambassador. The King, hearing of this, sent for the ambassador, and presented him with a royal pardon for Clapton. The Recorder and Sheriffs of London were charged to publish the same in the presence of the judges who had condemned him. (*Pub. Rec. Off., Venetian Trans.*, vol. xi., pp. 4 et seq.)

² Vattel, *suprà*; Fontinier *v.* Heyle, 3 *Burr. R.*, 1731; Lockwood *v.* Coysgarne, 3 *Burr. R.*, 1678; Delvalle *v.* Plomer, 3 *Campbell R.*, p. 47; Heathfield *v.* Chilton, 4 *Burr. R.*, 2016; Triquet *v.* Bath, 3 *Burr. R.*, 1478; W. Blackstone, *R.*, 471; Novello *v.* Toogood, 1 *Barn. and Cress. R.*, 554.

As to the inviolability of an ambassador's suite, see *Respublica v. De Longchamps*, 1 *Dall.*, 117; *Ex parte Cabrera*, 1 *Wash. C. C.*, 232.

born in a foreign country, are considered as natives. 'A respect due to sovereigns,' says Vattel, 'should reflect on their representatives, and chiefly on their ambassadors, as representing their master's person in the first degree. Whoever affronts or injures a public minister commits a crime the more deserving a severe punishment, as thereby the sovereign and his country might be brought into great difficulties and trouble. It is just that he should be punished for his fault, and that the State should, at the expense of the delinquent, give a full satisfaction to the sovereign affronted in the person of his minister. If a foreign minister offends a citizen, the latter may oppose him without departing from the respect due to the character, and give him a lesson which shall both efface the stain of the outrage, and expose the author of it.¹ The person offended may further prefer a complaint to his sovereign, who will demand of the minister's master a just satisfaction. The great concerns of the State forbid the citizen, on such occasions, to entertain those thoughts of revenge which the point of honour might suggest, though otherwise allowable. Even, according to the maxims of the world, a gentleman receives no disgrace by an affront for which it is not in his power, of himself, to procure satisfaction. The necessity and right of embassies being established, the inviolability of ambassadors and other public ministers is a certain consequence of it ; for if their person be not protected from violence of every kind, the right of embassies becomes precarious, and the success very uncertain. A right to the end, is the right to the necessary means. Embassies, then, being of such great importance in the universal society of nations, and so necessary to their common well-being, the person of ministers charged with this embassy is to be *sacred and inviolable* among all nations.'²

§ 13. It is proper to distinguish between the *inviolability*

¹ A foreign minister who has committed an assault may be struck in self-defence by the person assaulted. (United States *v.* Little, 2 Wash. C. C., 205.)

² Vattel, *Droit des Gens*, liv. iv. ch. ix. § 81 ; Wicquefort, *De l'Ambas.*, liv. i. § 27 ; Martens, *Précis du Droit des Gens*, §§ 214-218 ; Horne, *On Diplomacy*, sec. iii. §§ 20-22 ; Phillimore, *On Int. Law*, vol. ii. §§ 154 et seq. It was resolved by the English Parliament, that the slaying of the Genoese ambassador in England in the reign of Richard III. was high treason, for ambassadors should be protected like princes. (State Papers, 3 Rich III., num. 18.)

Exemption from all local jurisdiction

of the public minister and the legal fiction of his *extra-territoriality*. The former is not a consequence of the latter, but the latter was invented for the purpose of giving security to the former. The mere fact of a public minister being regarded as a foreigner, resident in a foreign country, would not, of itself, necessarily exempt him from local jurisdiction. Article 14 of the Code Napoléon provides for bringing before the French tribunals a foreigner resident in a foreign country, even for engagements contracted in a foreign country with a Frenchman. If, therefore, the exemption of the minister depended upon his extra-territoriality, or implied foreign residence, he might still be subject to local jurisdiction. The true basis of all diplomatic privilege consists in the idea of inviolability which international jurisprudence attaches to his person and his office, and from which it cannot be severed. This idea of inviolability is an inherent and essential quality of the public minister, and the office cannot exist without it. International law has conferred it upon the State or sovereign which he represents, and to divest him of that quality, is to divest him of his office, as the two are inseparable. Not so with respect to the fiction of extra-territoriality.¹ So far as that is necessary

¹ Bluntschli, *Droit International*, p. 112, says, 'La fiction de l'exterritorialité n'est pas la cause de l'immunité dont les personnes ci-dessus jouissent en pays étranger; elle en est simplement l'application à une personne déterminée: la vraie cause c'est le respect de l'indépendance de ceux qui sont chargés de représenter les états. Cette fiction n'a donc que des effets relatifs: sa portée est réglée par les causes réelles de cette immunité. . . . La personne qui jouit de l'exterritorialité n'est pas soumise à la juridiction des tribunaux criminels de l'état où elle réside. . . . Cette disposition, confirmée par l'usage universel des peuples civilisés, est de droit singulier, parce qu'elle arrête le cours régulier de la justice. Elle a quelque chose analogue à l'irresponsabilité des souverains en droit public. Il est, du reste, prudent de rappeler qu'il serait dangereux de mettre à l'essai la valeur de ces fictions des jurisconsultes. . . . Il est, en général, dangereux de pousser trop loin les conséquences du principe de l'exterritorialité; le respect des lois et l'ordre public peuvent en souffrir. Le Droit international se borne à exiger qu'on protège la liberté et l'honneur des états dans la personne de leurs représentants; il ne veut pas qu'on laisse impunis les méfaits de certains individus.' One of the earliest applications of the word *extra-territorium* to ambassadors is to be found in Grotius. He says (*De Bell.*, lib. 2, cap. 18), 'De non violandis legatis difficilior quæstio, et varie a claris hujus sæculi ingeniis tractata. . . . Rationes quas pro se quisque afferunt nihil definite concludunt; quia jus hoc non ut jus naturale ex certis rationibus certo oritur, sed ex voluntate gentium modum accipit. Potuerunt autem gentes, aut omnino cavere legatis, aut cum certis exceptionibus, nam et hinc utilitas stat pœnæ in gravia delinquentes, et inde utilitas legationum, quarum mittendarum facilitas securitate quanta potest esse maxima optime promoveret. Spectandum ergo quousque gentes con-

to the exercise of his functions, or, in other words, to secure his inviolability, it is not an essential quality of the public minister, and therefore may be dispensed with by renouncement or otherwise. It will be seen, hereafter, that this distinction, which is made by the best writers on public law, leads to very important results. As a consequence of the sacredness and inviolability of the person of a public minister, he is entitled to an entire exemption from the local jurisdiction, both civil¹ and criminal. This exemption commences

senserint ; quod ex solis exemplis evinci non potest. Exstant enim satis multa in partem utramque. Recurrendum igitur tum ad sapientium judicia, tum ad conjecturas.' He then cites *judicia*, one from Livy, one from Sallust ; then states his conjectures or reasons, the most important of which is 'quod securitas legatorum utilitati quæ ex pœnâ est, præponderat.' He then continues, 'Quare omnino ita censeo placuisse gentibus, ut communis mos, qui quemvis in alieno territorio existentem ejus loci territorio subjicit, exceptionem pateretur in legatis, ut qui sicut fictione quâdam habentur pro personis mittentium ("senatûs faciem secum attulerat, auctoritatem reipublicæ," ait de legato quodam M. Tullius), ita etiam fictione simili constituerentur quasi extra-territorium. Unde et civili jure populi apud quem vivunt non tenentur.'

¹ A question was raised in 1888 as to the service of the process of British Courts upon ministers to foreign countries, in the foreign countries to which they may be accredited. General Blanco, formerly President of the State of Venezuela, and then its plenipotentiary to France, was served with the process of the English High Court while at Paris, where he was an accredited minister, and actually resident. The action was brought by the New Chili Gold Mining Company against General Blanco and another person for slander of the company's title to a certain concession, and for conspiracy formed in England to dispose of the concession to other parties ; the other defendant resided in England, and had been regularly served. Blanco being resident in Paris, an order was made by an English judge to allow process to be served upon him there, and he had been so served. Blanco applied to the English Court to have the process set aside on the ground that he was then accredited at Paris as plenipotentiary from the State of Venezuela. His affidavit entered fully into the nature of the transactions which formed the foundations of the alleged cause of action, and denied any ground of it. The late Mr. Baron Huddleston, in giving judgment, said that some points raised in the arguments went rather to the question of the power or discretion of the Court to allow service of such process ; while other points raised a question of considerable importance in international law, the contention in substance being that a foreign minister, at a foreign Court, has the same privileges in that foreign country as are extended to foreign ministers by England in England. The argument in favour of privilege in such a case found support in Blackstone, but the privilege of ambassadors ought not to be extended by England beyond ambassadors in England, and he should be very loth, as at present advised, to hold that the same privilege was to be extended by English Courts to ambassadors in a foreign country, who could be sufficiently protected by the laws of that foreign country. However, as the decision of the Court would go upon the other points, it was not necessary to determine the international question. The process would be set aside, but on other grounds. (New Chili Gold Mining Company v. Blanco, 4 *Times Law Reports*, 346.)

the moment he enters the territory of the State to which he is sent, and continues, not only during the whole time of his residence, but until he leaves the country, or at least till he loses his official character, and the protection due to his office. The State to which he is accredited may at any time require him to leave, either before or after his recall by his own Government. Sometimes the period within which he must leave is designated in his letter of dismissal ; and, at the termination of that period, the protection due to his office necessarily ceases.¹

In the reign of Queen Anne, an ambassador from Peter the Great, Czar of Muscovy, was arrested and taken out of his coach in London for a debt of fifty pounds which he had there contracted. Instead of applying to be discharged upon his privilege, he gave bail to the action, and the next day complained to the Queen. The persons who were concerned in the arrest were examined before the Privy Council (of which the Lord Chief Justice Holt was at the same time sworn a member), and seventeen were committed to prison, most of whom were prosecuted by information in the Court of Queen's Bench at the suit of the Attorney-General, and at their trial before the Lord Chief Justice were convicted of the facts by the jury, reserving the question of law, how far those facts were criminal to be afterwards argued before the judges, which question was never determined. In the meantime the Czar resented this affront very highly and demanded that the sheriff of Middlesex and all others concerned in the arrest should be punished with instant death. But the Queen, to the amazement of that despotic court, directed her secretary to inform him that she could inflict no punishment upon even the meanest of her subjects, unless warranted by the law of the land, and therefore was persuaded that he would not insist

When the defendant in a Chancery suit in England was at the time acting as ambassador in Spain, the proceedings were stayed for a year and a day, or unless he should return sooner. And it appeared that this stay of proceedings might be renewed as often as necessary. (Pilkington v. Stanhope, *Vernon's Cas.*, ii. 317.)

¹ Wheaton, *Elem. Int. Law*, pt. iii. ch. i. § 14; Phillimore, *On Int. Law*, vol. i. § 219; vol. ii. § 153; Grotius, *De Jure Bel. ac Pac.*, lib. ii. cap. xviii. §§ 1-6; Rutherford, *Institutes*, b. ii. ch. ix. § 20; Klüber, *Droit des Gens Mod.*, pt. ii. tit. ii. § 203; Bynkershoek, *De Foro Legat.*, c. 17-19; Blackstone, *Commentaries*, vol. i. p. 253; Foelix, *Droit Int. Privé*, §§ 169, 188, 210 et seq.; Heffter, *Droit International*, §§ 204, 205, 212-215; Villefort, *Privilèges Diplomatiques*, pp. 7 et seq.

upon impossibilities. To satisfy, however, the clamours of the foreign ministers (who made it a common cause), as well as to appease the wrath of Peter, a bill was brought into Parliament and afterwards passed into a law to prevent and punish such outrageous insolence for the future. And with a copy of this Act, elegantly engrossed and illuminated, accompanied by a letter from the Queen, an ambassador extraordinary was commissioned to appear at Moscow, who declared that though her Majesty could not inflict such a punishment as was required, because of the defect in that particular of the former established constitutions of her kingdom, yet with the unanimous consent of the Parliament she had caused a new Act to be passed to serve as a law for the future. This humiliating step was accepted as a full satisfaction by the Czar; and the offenders at his request were discharged from all further prosecution.¹

¹ Blackstone, *Comm.*, b. i. c. vii. ; Boyer, *Annals of Queen Anne*.

The Act is as follows. It is quoted as 7 Anne, c. 12 :—‘Whereas several turbulent and disorderly persons, having in a most outrageous manner insulted the person of his Excellency Andrew Artemonowitz Mattuof, Ambassador Extraordinary of his Czarish Majesty, Emperor of Great Russia, her Majesty’s good friend and ally, by arresting him and taking him by violence out of his coach in the public street and detaining him in custody for several hours, in contempt to the protection granted by her Majesty, contrary to the law of nations and in prejudice of the rights and privileges which ambassadors and other public ministers authorised and received as such have at all times been thereby possessed of, and ought to be kept sacred and inviolable, be it therefore declared by the Queen’s most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in Parliament assembled, and by the authority of the same, that all actions and suits, writs and processes commenced, sued or prosecuted against the said ambassador by any person or persons whatsoever, and all bail bonds given by the said ambassador or any other person or persons on his behalf, and all recognizances of bail given or acknowledged in any such action or suit, and all proceedings upon or by pretext or colour of such action or suit, writ or process, and all judgments had thereupon, are utterly null and void, and shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever.

‘2. And be it enacted by the authority aforesaid that all entries, proceedings and records against the said ambassador or his bail shall be vacated and cancelled.

‘3. And to prevent the like insolences for the future, be it further declared by the authority aforesaid, that all writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of an ambassador or other public minister of any foreign prince or State authorised and received as such by her Majesty, her heirs, or successors, or the domestic, or domestic servant of any such ambassador or other public minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized or attached, shall be deemed and ad-

If he plot
against
the
govern-
ment

§ 14. But to the general exemption of a public minister from the local jurisdiction of the country of his residence, there are certain exceptions which are well recognised and established in international jurisprudence. These exceptions are: 1. Where he plots against the safety of the Government to which he is accredited; 2. Where he owes allegiance to the country of his residence; 3. Where he has been received on condition of renouncing any claim to be exempt from the local jurisdiction.

The first of these can hardly be considered a full exception to the general rule of exemption, for it only authorises the enforcement of local jurisdiction, and the exercise of local authority, so far as may be necessary for the defence of the State. 'In case of offences,' says Wheaton, 'committed by judged to be utterly null and void to all intents, constructions, and purposes whatsoever.'

'4. And be it further enacted by the authority aforesaid, that in case any person or persons shall presume to show forth or prosecute any such writ or process, such person and persons, and all attorneys and solicitors prosecuting and soliciting in such case, and all officers executing any such writ or process being thereof convicted by the confession of the party, or by the oath of one or more credible witness or witnesses before the Lord Chancellor or Lord Keeper of the Great Seal of Great Britain, the Chief Justice of the Court of Queen's Bench, the Chief Justice of the Court of Common Pleas for the time being, or any two of them, shall be deemed violaters of the laws of nations and disturbers of the publick repose, and shall suffer such pains, penalties and corporal punishment as the said Lord Chancellor, Lord Keeper, and the said Chief Justices, or any two of them, shall judge fit to be imposed and inflicted.'

'5. Provided and be it declared that no merchant or other trader whatsoever, within the description of any of the statutes against bankrupts, who hath or shall put himself into the service of any such ambassador or publick minister, shall have or take any manner of benefit by this Act, and that no persons shall be proceeded against as having arrested the servant of an ambassador or publick minister by virtue of this Act, unless the name of such servant be first registered in the office of one of the principal Secretaries of State, and by such secretary transmitted to the Sheriffs of London and Middlesex for the time being, or their undersheriffs or deputies, who shall upon the receipt thereof hang up the same in some publick place in their offices, whereto all persons may resort and take copies thereof without fee or reward.'

'6. And be it further enacted by the authority aforesaid that this Act shall be taken and allowed in all Courts within this kingdom as a publick Act, and that all judges and justices shall take notice of it without special pleading, and all sheriffs, bailiffs, and other officers and ministers of justice concerned in the execution of process are hereby required to have regard to this Act, as they will answer the contrary at their peril.'

The Act is only declaratory of the common law of England, of which the law of nations must be deemed a part. (*Novello v. Toogood*, 1 *B. and C.*, 562.) In the United States a similar statute was passed, April 30, 1790. In France the inviolability of ambassadors was declared by the Constituent Assembly in 1789.

public ministers, affecting the existence and safety of the State where they reside, if the danger is urgent, their persons and papers may be seized, and they may be sent out of the country.' In all other cases, it appears to be the established usage of nations to request their recall by their own sovereign, which, if unreasonably refused by him, would unquestionably authorise the offended State to send away the offender. There may be other cases which might, under circumstances of sufficient aggravation, warrant the State thus offended in proceeding against an ambassador as a public enemy, or in inflicting punishment upon his person, if justice should be refused by his sovereign. But the circumstances which would authorise such a proceeding are hardly capable of precise definition, nor can any general rule be collected, from the examples to be found in the history of nations, where public ministers have thrown off their public character and plotted against the safety of the State to which they are accredited. These anomalous exceptions to the general rule resolve themselves into the paramount right of self-preservation and necessity. Grotius distinguishes here between what may be done in the way of self-defence, and what may be done in the way of punishment. Though the law of nations will not allow an ambassador's life to be taken away as punishment for a crime after it has been committed, yet this law does not oblige the State to suffer him to use violence without endeavouring to resist it. The weight of authority is, that an ambassador cannot be *punished* by the Government to which he is accredited, for plotting against it, although he may be *forcibly resisted*, and if necessary, *forcibly ejected* from the country.¹

§ 15. In the second case, that is, where the minister owes allegiance to the country where he resides, and has been received on condition of renouncing any claim to be exempt from the local jurisdiction, a question may arise as to whether such minister is to be considered as really the representative of the country by which he is accredited. And if he is to be

If he
renounce
his right
of ex-
emption

¹ Wheaton, *Elem. Int. Law*, pt. iii. ch. i. § 15 ; Grotius, *De Jure Bel. ac Pac.*, lib. ii. cap. xviii. § 4 ; Bello, *Derecho Internacional*, pt. iii. cap. i. § 3.

The authorities to the contrary are Hale, *Pleas of the Crown*, l. 99 ; Foster, *Crown Law*, 188 ; Comyn's *Digest*, 'Ambassador ;' Huberus, *D. Jure Civ.* ; and according to R. v. Owen, 1 *Rolls*, 'an ambassador may be condemned and executed for treason if he has conspired the death of the sovereign to whose territory he is sent.'

regarded as such representative, can the renouncement of his privilege of exemption from local jurisdiction extend to the *inviolability* of his person and office? In other words, must not such renouncement, however general in its terms, be limited to his right of *extra-territoriality*, and with respect to civil jurisdiction only? Would it not be utterly incompatible with his official character, for him to submit to be tried and punished under the local laws as a criminal? But these questions will be more particularly considered in the following paragraphs. The case here supposed is one of theory only, and of little practical importance in modern jurisprudence, as States now never permit their ministers to make any such general renouncement of their diplomatic rights and character.

If he
volun-
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local
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diction

§ 16. In the third case, that is, where the minister makes a special renouncement of his privilege of exemption and voluntarily submits to the local jurisdiction, several important questions will arise with respect to the manner of making the renouncement, and with respect to the extent of jurisdiction which may be exercised, even where the renouncement is duly made. In the first place, is it sufficient that the minister himself renounces his privileges of exemption, and submits to local jurisdiction, in order to authorise the courts to exercise that jurisdiction; or is it necessary to have the permission of his own government for that purpose? ¹ Admitting the necessity of such assent or permission, how is the government to which he is accredited, or its local authorities, to ascertain the fact? Can they go behind the act of the minister to examine his instructions, or to judge between him and his government, as to his authority to act in a matter of this kind? In doing so, would they not assume the character of *Mentor* over the representative of a foreign State? No doubt, the act of the minister must be presumed to have the consent of his government, to which alone he is responsible. But this consent being presumed, and the renouncement being within the acknowledged limits of the minister's powers, how is it to be made? Wicquefort is of opinion that a minister who contracts before a notary (*qui avait contracté par-devant notaire*) thereby renounces his privilege of exemption from local jurisdiction, so

¹ The permission of his Government is necessary. (United States v. Benner, 1 *Baldw.*, 240.)

far as concerns that particular contract. In the case of Mr. Wheaton, who, when American minister at Berlin, had entered into a contract of lease for the house in which he resided, the landlord, on his removal at the expiration of the lease, retained the minister's goods as security for alleged damages to the premises, under a general provision of the Prussian civil code, giving him the right to the goods of a tenant, as hypothecated for the payment of the debt. The Prussian government, when appealed to by the American minister, refused to interfere.¹ The municipal law of most countries gives to the landlord a lien upon the goods of the tenant as a security for payment of the rent. If the goods or property be instrumentality of sovereignty the local court should not enforce the lien by compulsory process, even if the case be one in which the law would create a lien on property as between citizens. If in the case of Mr. Wheaton the landlord claimed only a lien, to enforce which he would be obliged to invoke the aid of the local court, and the property was of a kind which would be exempt from seizure by direct process, it should have been secured to Mr. Wheaton.

But if Mr. Wheaton had pledged the goods to the landlord by a formal contract, he might be considered as having waived his privilege in respect of them. In the case of M. de Silveira, *conseiller* of the Portuguese legation at Paris, who had been separated from his wife, and had entered into a contract to give her a certain allowance, in which the parties had declared themselves to be domiciled in Paris, and the husband had deposited for this allowance a certain sum in the *Caisse de Consignations*;—in a suit by his wife for, among other things, the said alimentary allowance, he pleaded his exemption as diplomatic agent. This title was not contested, and the courts admitted his general exemption from local jurisdiction, but sustained it with respect to the alimentary provision. But neither the opinion of Wicquefort, nor the cases above referred to, are regarded as good authority. The better opinion is, that there must be a special submission to local jurisdiction in the particular case, either directly made, or necessarily implied, by the act of bringing suit as plaintiff, or of consenting to appear as defendant, in a civil action ; and

¹ Mr. Legare's despatch to Mr. Wheaton of June 9, 1843 ; Baron de Bulon's letter to Mr. Wheaton, July 5, 1844.

certainly, a renouncement of the privilege of exemption must be equally as unequivocal in criminal proceedings. Supposing the renouncement of the diplomatic privilege, and submission to local jurisdiction, to be duly made, we have next to inquire into the *extent* of jurisdiction which is conferred by such acts, and may be lawfully exercised by the local tribunals. We shall consider this question, *first*, with respect to civil suits, and *second*, with respect to criminal matters.¹

Extent of
civil
juris-
diction

§ 17. *First*, of civil jurisdiction. Voluntary submission to local civil jurisdiction presents two classes of cases: 1st, Where the minister voluntarily appears as defendant in a civil action and admits jurisdiction; and 2nd, Where he appears as plaintiff, and avails himself of the local jurisdiction against another as defendant.

The former class of cases seems, at first sight, to present more difficulties, with respect to *extent* of jurisdiction, than the latter; for, if judgment be given against the minister as defendant, the execution or other process for its satisfaction issued against his property or person, might seriously infringe upon his diplomatic privilege of *inviolability*. But, in fact, the same result might follow in a case where he is plaintiff; for, if he fail in his suit, judgment might be decreed against him for costs. Moreover, the defendant may present and establish counter-claims to a larger amount than his demand, and thus obtain judgment for the difference. And again, the opposing party may appeal to a higher tribunal, and thus carry the minister, against his consent, to a higher court. Does the minister, by voluntarily submitting to, or claiming the local jurisdiction, become liable to all the consequences the same as an ordinary litigant? It would certainly be very absurd to allow him to claim it in any particular case, and then to withdraw himself from it whenever such a course suited his interest, or convenience. And yet to execute, against him as against an ordinary litigant, the judgment of the court, would seriously compromise the *inviolability* of his diplomatic character. In order to obviate this difficulty, some make a distinction between the judicial proceedings of the court before final judgment, and the supplementary pro-

¹ Villefort, *Privilèges Diplomatiques*, pp. 10 et seq.; *Gazette des Tribunaux*, Aug. 15, 1875; *Revue Etrangère et Française*, tome ii. p. 31; Martens, *Causes Célèbres*, tome i. p. 229.

ceedings for the execution of that judgment. 'This last theory,' says Villefort, 'although vague and somewhat arbitrary, is, perhaps, the best in a matter where it may be said more reasonably than in any other, that there is no absolute rule. It, moreover, has the advantage of conforming to the principles laid down by the ancient publicists who founded the science.' According to this view, no proceedings by way of execution of judgment can be taken against the person of the minister, or against any of his property which, by the rules of international jurisprudence, is entitled to the privilege of exemption; in other words, although a minister may renounce his right of *extra-territoriality*, he cannot divest himself of the *inviolability* which the law of nations attaches to his person and office.

The following consequences seem to result from this discussion: 1st, If a minister renounces his privilege of exemption, and submits to local jurisdiction by appearing in a civil action, either as plaintiff or defendant, and judgment be rendered against him, he is bound to pay it; 2nd, If the judgment be in his favour, and the other party appeal to a higher tribunal, he must submit to the jurisdiction of appeal; 3rd, A final judgment against a minister can only be satisfied out of property which he possesses separate and distinct from his diplomatic character, and no proceedings can be taken against his person, or against property privileged by the law of nations.¹ In 1720, the Envoy Extraordinary of the Duke of Holstein was sued in Holland for debt, contracted by him in course of trade. A decree of arrest and citation was granted against him; all his goods, money and effects within the jurisdiction of the court were subjected to the decree, but his movables and things belonging to him as ambassador were exempt.²

But does an ambassador who, while accredited to a foreign Court, engages in trade, forfeit his privileges as ambassador? The answer is this: Such a person does not forfeit his privileges by engaging in mercantile transactions; although his servants do in England, by virtue of the exception in the

¹ Villefort, *Privilèges Diplomatiques*, pp. 4-18; Riquelme, *Derecho Púb. Int.*, lib. ii. cap. Ad., § 2; Merlin, *Répertoire*, verb. 'Ministre Public,' sec. v.

² Bynkershoek, *De Foro Legat.*, cap. xiv. § 13; cap. xvi. § 2.

statute of Queen Anne. In the case of *Taylor v. Best and others*,¹ decided in 1854, the Lord Chief Justice Jervis said, 'If an ambassador or public minister, during his residence in England, violates the character in which he is accredited to that court, by engaging in commercial transactions that may raise a question between the Government of Great Britain and that of the country by which he is sent, he does not thereby lose the general privilege which the law of nations has conferred upon persons filling that high character—the proviso in the statute of Anne limiting the privilege in cases of trading, applying only to the servants of the embassy. For this, *Barbuit's* case (*Cas. Temp. Talbot*, 281) is an authority.' And Mr. Justice Maule added, 'There is a manifest distinction between the case of an ambassador and that of a domestic servant of an ambassador. The privilege is not that of the servants but of the ambassador. It is based on the assumption that, by the arrest of any of his household retinue, the personal comfort and state of the ambassador might be affected. Where these are not interfered with, the ambassador is not affected by the suit, and consequently the servant has no privilege. These cases do not in any degree determine the point which has been attempted to be raised on the present occasion—and undoubtedly it is a point which is very fit to be considered whenever it may be properly presented for decision—viz., whether an ambassador or public minister can be brought into court, against his will, by process not immediately affecting either his person or his property, and have his rights and liabilities ascertained and determined. Unquestionably it must to a certain extent interfere with the ambassador's comfort to have his rights in any way made the subject of litigation, and therefore it may as well be that the privilege he enjoys is as large and extensive as Mr. Justice Blackburn affirms it to be. But it is unnecessary to determine that question upon the present occasion.'

In the case of the *Magdalena Steam Navigation Company v. Martin*, decided in 1859, Lord Campbell delivered judgment:—'The question raised by this record is whether the public minister of a foreign State accredited to and received by her Majesty, having no real property in England, and

¹ 14 C. B., 487.

having done nothing to disentitle him to the privileges generally belonging to such public minister, may be sued against his will in the courts of this country for a debt, neither his person nor his goods being touched by the suit, while he remains such public minister. He says by his plea to the jurisdiction of the court that, by reason of his privilege as such public minister, he ought not to be compelled to answer. We are of opinion that his plea is good, and that we are bound to give judgment in his favour. The great principle is to be found in Grotius, "De Jure Belli et Pacis," lib. 2, cap. xviii., sec. 9, "Omnis coactio abesse a legato debet." He is to be left at liberty to devote himself body and soul to the business of his embassy. He does not owe even a temporary allegiance to the sovereign to whom he is accredited, and he has at least as great privileges from suits as the sovereign whom he represents. He is not supposed even to live within the territory of the sovereign to whom he is accredited, and if he has done nothing to forfeit or waive his privilege, he is for all judicial purposes supposed to be still in his own country. For these reasons the rule laid down by all jurists of authority, who have written upon the subject, is that an ambassador is exempt from the jurisdiction of the courts of the country in which he resides as an ambassador. Whatever exceptions there may be, they acknowledge and prove this rule . . . Lord Coke's authority, 4 "Inst." 153, was cited, where, writing of the privileges of an ambassador, having said that "for any crime committed *contra jus gentium*, as treason, felony, adultery, or any other crime which is against the law of nations, he loseth the privilege and dignity of an ambassador as unworthy of so high a place," he adds, "and so of contracts that be good *jure gentium* he must answer here." There does not seem to be anything in the contract set out in this declaration contrary to the law of nations; but Lord Coke, who is so great an authority as to our municipal law, is entitled to little respect as a general jurist. For the plaintiffs it was strenuously maintained that at all events the action could be prosecuted to that stage (to judgment), with a view to ascertain the amount of the debt, and enable the plaintiffs to have execution on the judgment when the defendant may cease to be a public minister. But although this suggestion is thrown out in the discussion which took place in the Common Pleas in *Taylor*

v. *Best*, it is supported by no authority : the proceedings would be wholly anomalous ; it violates the principle laid down by Grotius ; it would produce the most serious inconvenience to the party sued, and it could hardly be of any benefit to the plaintiffs. In the first place there is a great difficulty in seeing how the writ can properly be served ; for the ambassador's house is sacred, and is considered part of the territory of the sovereign he represents ; nor could the ambassador be safely stopped in the street to receive the writ, as he may be proceeding to the Court of our Queen, or to negotiate the affairs of his sovereign with one of her ministers. . . . It certainly has not hitherto been expressly decided that a public minister, duly accredited to the Queen by a foreign State, is privileged from all liability to be sued here in civil actions ; but we think that this follows from well-established principles, and we give judgment for the defendant.' ¹

Of
criminal
juris-
diction

§ 18. *Second*, of criminal jurisdiction. This, also, involves two classes of cases : 1st, Where the minister is charged with crime and submits to be judged by the local tribunals ; and 2nd, Where he appears in the local tribunals, charging another with crime. The two classes of cases seem, at first sight, to be very different, and yet their result may be nearly the same with respect to the *inviolability* of the minister. A distinction, however, must be drawn in the second class, between the case where the minister appears simply as an informer, to give notice of the commission of a crime by another, and where he appears as a civil party in a criminal prosecution. In the former case, his official character is not involved, for he is no party to the judicial proceedings. But if he appears as a civil party, in a criminal prosecution, he may be seriously compromised. According to French law, if the accusation be declared slanderous (*calomnieuse*), he is liable to fine and imprisonment. Such a sentence, if attempted to be carried into execution, necessarily affects the *inviolability* of his official character, in the same manner, though in less degree, than where he himself is the original subject of the criminal proceeding. Wheaton, in speaking of the right of a minister to deliver his domestics up for trial, under the laws of the State where he resides, says, he may do this, 'as he may renounce any of the privileges to which he is entitled by the public

¹ 2 *E. and E.*, 111.

law.' Villefort says this statement is not only incorrect, but entirely unsupported by authorities. Perhaps he mistakes the meaning of Wheaton, by giving too literal a construction to his words. If the latter means to say that a public minister may submit himself to a criminal prosecution, which involves corporal punishment, disgrace or infamy, and still retain his official position as the representative of a foreign State, he is evidently in error, for the two characters are utterly incompatible. How could the government, to which he is accredited, continue its official intercourse with a man which its tribunals are trying as a criminal under its laws? Again, suppose he be condemned, and the sentence be executed, will it continue to recognise him, when declared infamous, or immured in the walls of a prison? But if Mr. Wheaton means to say that a public minister may renounce his official character, and, having ceased to be the representative of his government, deliver himself up as a private individual, for trial under the laws of the State where he resides, the correctness of the statement will not be disputed.¹

§ 19. As ministers are exempt from the jurisdiction of the tribunals of the country where they reside, whether civil or criminal, the question has often been discussed, how are they to be punished for their offences, and how are their creditors to obtain justice? The answer is easily deducible from the principles already discussed. The minister is the officer of the State which he represents, and, by the fiction of ex-territoriality, he is considered to be within the limits of his own country. His State is responsible for his acts the same as if committed within its own territory. If he commit an offence upon a citizen of the State where he resides, or refuse to do justice in any of his dealings, the injured party must submit his case to his own government, which will demand satisfaction and redress from the State to which the minister belongs. For offences against the laws of the country to which he is accredited, the government of that country may not only dismiss the minister, and send him out of the country, but may demand justice and punishment of his own country, a refusal of which demand will constitute a sufficient cause for com-

¹ Villefort, *Privilèges Diplomatiques*, pp. 18-27; Rayneval, *Inst. du Droit de la Nat.*, &c., tome i. p. 325; Hélie, *Traité de l'Instruction Crim.*, tome ii. ch. iv. § 124.

plaint, and, perhaps, for actual hostilities. History furnishes numerous cases of this kind. Thus, in 1567, Leslie, the Bishop of Ross, ambassador of Mary Queen of Scots, was banished¹ from England for conspiring against the sovereign, while the Duke of Norfolk, and other conspirators, were tried and executed. It is true that the crown lawyers deemed him liable to a *penal action*, but the correctness of their opinion was afterwards denied by Albericus Gentilis, Zouch, Sir Robert Cotton, Blackstone, and other eminent English authorities. Mendoza, the Spanish ambassador in England, was ordered, in 1584, to depart the realm, for conspiring to introduce foreign troops and dethrone the queen, and a commissioner was sent to Spain to prefer a complaint against him. Again, in the reign of James I., the Spanish ambassadors, Inoyosa and Colonna, were complained of to the king of Spain for a scandalous libel on the Prince of Wales and Duke of Buckingham, but allowed to depart without trial. In 1654, De Bass, the French minister, was ordered to depart the country in twenty-four hours, on a charge of conspiracy against the life of Cromwell. In 1717, Gyllenburg, the Swedish ambassador in England, was arrested and his papers seized, on a charge of conspiring against the king. This act was justified solely on the ground of necessity for self-defence. In 1718, the Prince of Cellamare, Spanish ambassador in France, was arrested, and his papers seized, under the same charge, and he was conducted, under a military escort, to the frontier. In neither of these cases was any attempt made to try and punish the minister, nor did any of the ambassadors from other courts complain of an infringement of the privileges of their order, though a protest from this body has always been usual when an injury has been done to any member of it resident at the same court. In the case of Gyllenburg, the

¹ He was first of all committed to the custody of the Bishop of London. The following questions were put to the civil lawyers, viz., Whether an ambassador, procuring an insurrection or rebellion in the prince's country towards whom he is ambassador, is to enjoy the privilege of an ambassador? and, whether he may not *jure gentium et civili Romanorum* be punished as an enemy, traitor, or conspirator against that prince, notwithstanding he be an ambassador? To which they answered:—'Touching those two questions, we are of opinion that an ambassador procuring an insurrection or rebellion in the prince's country towards whom he is ambassador, ought not *jure gentium et civili Romanorum* to enjoy the privileges otherwise due to an ambassador, but that he may notwithstanding be punished for the same.' (Burleigh's *State Papers*, by Murden.)

Spanish ambassador, Monteleone, simply observed that he was sorry some *other way* than the arrest of an ambassador, and the seizure of his papers, could not have been fallen upon for preserving the peace of the kingdom. In the case of Da Sa, brother of the Portuguese ambassador in England, charged, in 1653, with being accessory to a murder, he claimed the privileges of an ambassador ; but, on examining his credentials, it was found that he was simply promised a commission at a future time, on the recall of his brother. He was therefore ordered to plead to the indictment.¹ It was generally admitted that if Da Sa had actually been an ambassador, he would not have been liable to trial. The laws of England did not then extend, to the suite of a minister, the exemption of the minister himself from the jurisdiction of the courts of the country, in case of murder ; and it is very doubtful whether they would do so at the present day, especially in the case of domestic servants. In the present century, the British Government claimed the right to arrest the coachman of Mr. Gallatin, the United States minister in London, on a criminal charge for an assault committed outside the minister's residence, and to make the arrest within the limits, admitting, however, the propriety of first giving notice to the minister that he might deliver him up, or make arrangements with the police as to the time and manner of their entering to search and seize.² The general rule in other countries appears to admit that the minister's exemption extends to all the officers and members of his household ; the minister, and his Government, must be held responsible that the minister's suite and servants be properly punished for any offences they may commit.³

§ 20. But if the dependents of a foreign minister are exempt from local jurisdiction, who is to punish them for crimes, and for offences against the local laws? May the minister himself try, and punish them? Or may his State organise a

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¹ See further on this interesting case *A Narrative of the Late Accident in the New Exchange on November 21 and 22, 1653 (Old Style)*, by Don Pantaleon Sa, London, 1653 (reprinted in the *Harleian Miscellany*, vol. iii.) ; also *The Grand Trial in Westminster Hall of the Lord Ambassador's Brother from the King of Portugal*, London, printed for G. Horton, 1654, 4to., 8 pp.

² Wheaton, Dana's edit., 303, note.

³ Bynkershoek, *De Foro Legatorum*, caps. vi. et seq. ; Wicquefort, *L'Ambassadeur*, liv. i. § 29 ; Martens, *Causes Célèbres*, tome i. pp. 139 et seq. ; Wildman, *Int. Law*, vol. i. pp. 103-119 ; *State Trials*, vol. v. ; Lord Somers, *Tracts*, 10 65.

tribunal, in a foreign country, for that purpose? Or may the minister arrest and send them home for that purpose? Or should he discharge them from his service, and deliver them up for trial, under the laws of the State where he resides? These are important questions, upon which there has been some diversity of opinion and practice. In 1603, a man named Combaut, one of the retinue of the Duc de Sully, the French ambassador in London, killed an Englishman at a brothel. Sully tried the offender by a council of Frenchmen, and condemned him to death, after which he delivered him over to the English authorities, for execution. But James I. pardoned the culprit. The French, however, contended (and, we think, correctly), that, although King James might refuse to carry the sentence into execution, or might remit the execution *in England*, yet, as Combaut was a Frenchman, tried and condemned by a French tribunal, the English king had no power to grant him a pardon. The right of the French authorities to try and condemn in England seems not to have been questioned. Hotman mentions two cases of the exercise of this power by ambassadors, but does not approve it. One was that of the Spanish ambassador at Venice, who hung one of his servants from the window of his own hotel. The other was that of a French ambassador in England, during the reign of Elizabeth, who executed one of his servants for committing a rape upon a female of his family. In 1657, one of the servants of M. de Thou, the French ambassador in Holland, attempted violence upon a woman in La Haye. He was arrested by a patrol, and taken to the guard-house. The ambassador demanded his release, which was acceded to immediately, and the minister himself inflicted punishment upon the culprit. The Roman ambassadors punished their own dependents, because they were slaves. The earlier writers on international law conceded the same right to modern ambassadors, over the members of their own family and their servants, at least to the extent of irons, imprisonment, and any corporal punishment, short of taking life. Some even contended for their right to punish with death, where that penalty would be imposed by the laws of the minister's own State. But more recent publicists are of opinion that the minister cannot himself try or punish criminal offences, and that his own government cannot be permitted to organise

a tribunal for that purpose in a foreign State. The minister's house and suite are, for the necessary purposes of his mission, to be regarded as without the territory of the State, but judicial proceedings, and the local punishment of crime, are not the necessary appendages of diplomacy. But may not the minister arrest any member of his suite, and send him home for trial and punishment; and if so, does this power include the sending away subjects of the State in which the minister resides? Where citizens of the State enter the service of a foreign minister, they are to be regarded as emigrants from their own, and as domiciled in a foreign country, and consequently as beyond the jurisdiction and protection of their own government. With respect to the general right to arrest and send home, there seems to be no objection, if no force be used.¹ But the minister has no force of his own for this purpose, nor can he require the foreign State to assist him. Moreover, if the criminal is sent to another country for trial, much difficulty would generally result in procuring the attendance of witnesses, and in proving the offence or crime, even where jurisdiction could be taken of the case of crime committed within another State. It, therefore, seems to be the preferable mode, as a general rule, where an employé or minister violates the laws of the State in which he resides, to deliver him for trial and punishment by the laws which he has violated. There are exceptional cases, where the minister would be justified in refusing to make such surrender, and in demanding any such person from the local authorities. As already remarked, a minister is held responsible, to a certain extent, for the conduct of his dependents, and if he neglect to provide for their punishment under the laws of his own

¹ In 1867 a Russian named Michilchenkorff called at the Russian embassy in Paris, and, being refused his demands, attacked and wounded one of the attachés, besides wounding two other persons. The police being sent for, entered the embassy and arrested the man. The Russian Ambassador, who was absent at the time of the occurrence, demanded that the case should be tried in Russia, on the ground that the French Court had no jurisdiction over the embassy. The French Government, however, considering that the principle of extra-territoriality did not extend to the case of a person entering an embassy under the above circumstances, refused to give up the prisoner; moreover they pointed out that the privilege of the embassy—if it, in fact, existed in such case—was waived by the act of calling in the French police. The prisoner was afterwards tried by the French Court, with the approval of the Russian Government.

country, or to dismiss them from his service, and deliver them up to the local tribunals, he is necessarily regarded as either the instigator or defender of the offences or crimes which they commit. Such a course of conduct, on his part, may constitute a sufficient cause for his dismissal. It was on this ground that the President of the United States, in 1856, revoked the *exequatur* of the British consul at New York. It was not alleged that the consul had himself been guilty of engaging in the enlistment of British troops within the limits of the United States, but that the offence had been committed by his secretary, with his knowledge, and even in his presence, and that he had neither punished nor dismissed his subordinate, nor had he even disavowed the acts of that subordinate. But, as already stated, the secretary of legation, and other functionaries of embassy, are sometimes, in a measure, independent of the minister, and have the right of *inviolability* due to representatives of their own State. In such cases, the minister can neither dismiss them from the legation, nor can he divest them of their diplomatic immunity, so as to render them justiciable by the local tribunals. The government against which the offence is committed, must, therefore, seek its redress from the State by which such diplomatic agents are appointed, and which is to be held responsible for their good conduct.¹

Testimony
of
ministers,
&c.

§ 21. In case of crime committed in the house of a foreign minister, or by one of his suite, and the accused be given up to be tried by the local authorities, as, also, in cases of crime committed by others, it not unfrequently happens that the only or most important witnesses are the minister, his family, his employés, or members of his legation. But if such persons are entirely exempt from local jurisdiction, how can their evidence be taken?—if they refuse to give it, must the guilty escape unpunished? It is true that they cannot be compelled to appear and give testimony in such cases, unless the right of compulsion be secured by treaty stipulations;

¹ *Cong. Doc.*, 34th Congress, 1st Sess. H. R., *Ex. Doc.*, No. 107; Rutherford, *Institutes*, b. ii. ch. ix. § 20; Klüber, *Droit des Gens Mod.*, §§ 212–214; Huber, *De Jure Civitatis*, liv. iii. sect. iii. cap. ii.; Hotman, *Traité de l'Ambassadeur*, ch. iii. p. 71; Ward, *Hist. Law of Nations*, vol. ii. pp. 486 et seq.; Garden, *De la Diplomatie*, liv. v. § 21; Heffter, *Droit International*, § 216; Burlamaqui, *Droit de la Nat. et des Gens*, tome v. pt. iv. ch. xv.; Gardner, *Institutes*, pp. 498 et seq.

nevertheless, modern custom has established the practice, that where the deposition of a minister, or of any person attached to his suite, is required in the courts of the country wherein the minister resides, the secretary, or minister of foreign affairs, requests the minister to appear, or to cause the person summoned to appear, before some competent authority, have their depositions taken, and in due form communicated to the authority which made the request. In most cases, the depositions are taken before the secretary of their own legation. In criminal trials, the laws of some countries require that the testimony be given before the court, and in presence of the accused. In such cases, the foreign office requests the personal attendance of the minister, or person summoned, at the time and place designated. To refuse to comply with such request, without good and substantial reasons, is now regarded as discourteous and disrespectful to the government which makes it, and may justify the dismissal of such minister. In 1856 the government of the United States of America requested the recall of the minister of the Netherlands, for having refused to appear before the court, in the city of Washington, to give his testimony in a criminal cause which was then pending, and in which this minister was a most important witness. There may, however, be cases where the minister would be fully justified in declining to accede to such a request. For instance, if the court should be so wanting in dignity and character as to permit its officers and attorneys to annoy witnesses, by unnecessarily prolonged cross-examinations, and by questions irrelevant and insulting to the witness or to his government, a minister would unquestionably be justified in declining to appear himself, or to direct the appearance of any of his suite, before such a tribunal. A court which allows such license, with respect to ordinary witnesses, forfeits its own dignity and character ; but when it is permitted toward officials of foreign States, it is also guilty of disrespect to such States, and violates the law of international comity.¹

§ 22. The independence of a public minister would be very imperfect, if the house in which he lived, and his personal effects or movables, were not entirely exempt from

Exemption of minister's house, &c.

¹ Horne, *On Diplomacy*, sect. iii. § 25 ; Marcy, *Letter to American Minister to the Netherlands*, Cong. Doc. ; Gardner, *Institutes*, p. 502.

the local jurisdiction.¹ Otherwise, he might be disturbed under a thousand pretences, his papers searched, his secrets discovered, and his person exposed to insults. Hence, his house is inviolable, and cannot be entered without his permission, by police, custom-house, or excise officers, nor can troops be quartered in it. For the same reasons, his coaches and carriages are usually exempt from all local jurisdiction and examination. But the abuse of this privilege, on the part of ministers, by making their houses an asylum for fugitives from justice, and their carriages a means of effecting the escape of guilty persons, has caused it to be very much restrained by the municipal laws of some countries, sanctioned, in some degree, by the tacit consent of other nations.² On this subject, Vattel remarks, that 'an ambassador's house, being independent of the ordinary jurisdiction, no magistrate, justices of the peace, or other subordinate officers, are in any case to enter it by their own authority, or to send any of their instruments, unless it be on an occasion of pressing necessity, where the public welfare is in danger, and which admits of no delay. Whatever concerns a point of such weight and delicacy ; whatever affects the right and glory of a sovereign power ; whatever may embroil the State with that power, is to be laid immediately before the sovereign, and regulated by himself, or, on his orders, by his council of State. Thus, a sovereign is to determine how far the right of asylum, which an ambassador attributes to his house, is to be regarded ; and if the delinquent be such that his detention or punishment is of great importance to the State, the prince is not to be withheld by the consideration of a privilege which was never given for the detriment and ruin of States.' Thus, when the Duke of Ripparda, in 1726, took shelter in the house of the English ambassador, Lord Harrington, the council of Castile decided that he might be taken out of it, even by force, for, otherwise, what was intended for the benefit of sovereigns would turn to the

¹ It has been held in the French courts, that an ambassador's house does not enjoy the fiction of being situated in the country from which the ambassador is accredited, with regard to acts affecting the inhabitants of the country to which he is accredited. (Tribunal of the Seine, First Chamber, July 2, 1872, and June 21, 1873.)

² No right of asylum to refugees in the house of an ambassador appears to be founded on the law of nations. (See Grotius, Wicquefort, Bynkershoek, Merlin, *passim*.)

ruin and destruction of their authority. The Marquis of Fontenay, French ambassador at Rome, sheltered certain Neapolitan exiles and rebels, and attempted to take them out of Rome in his coaches ; but the coaches were stopped at the gates and the Neapolitans conveyed to prison. The ambassador sharply complained of this, but the Pope answered him : ‘ That he had given orders for seizing those whose escape the ambassador had favoured ; that since he took the liberty of protecting villains and criminals of all kinds within the ecclesiastical State, he, who was sovereign, should at least be allowed to lay hold of them again, whenever they could be met with, *as the rights and privileges of ambassadors were not to be carried to such a height.*’ A criminal at Madrid, in the time of Philip II., escaped from justice and took refuge in the house of the Venetian ambassador. The ambassador and suite resisted the officers of justice, but some of the suite were hanged or flogged by the Spanish government.¹ In 1747, a Swedish merchant, named Springer, accused of high treason, took refuge in the hotel of the English ambassador at Stockholm. The ambassador at first refused to surrender him ; but after the Swedish government had surrounded his house with troops, searched everybody who entered it, and caused his carriage, when he left the hotel, to be followed by a guard, he surrendered Springer, under a protest as to the violence done to his ambassadorial privilege. England demanded reparation, but Sweden steadily refused it, and the ambassadors of the two governments were mutually withdrawn. Phillimore, the English author, commenting upon this case, says : ‘ It seems clear that the conduct of Sweden was in accordance with the principles of international law.’²

§ 23. But the real property of a minister, other than his dwelling situate within the territory of the government to which he is accredited, and the personal property of which he may be possessed, as a merchant, or private person, carrying on trade or other business, or in a fiduciary character as an executor, &c., are not exempt from the operation of the local laws and local jurisdiction. The reason of this is, that

His other
real
estate

¹ De Callières, *Manuel de Négoc.*, ii. 294.

² Vattel, *Droit des Gens*, liv. iv. ch. ix. §§ 113-115 ; Toucey, *Opinions U. S. Attys.-Genl.*, vol. v. p. 70 ; Horne, *On Diplomacy*, sect. iii. §§ 30, 31 ; Phillimore, *On Int. Law*, vol. ii. §§ 180, 204, 205 ; Martens, *Guide Diplomatique*, §§ 23-27.

the minister does not hold such lands and goods by virtue of his office ; they are not annexed to his person so as, like himself, to be reputed out of the territory. Every dispute or suit respecting them must be carried on in the tribunals of the country, and they are subject to the ordinary process and proceedings of the courts, even of attachment and seizure. But, as already remarked, the house in which he lives, his carriages, furniture and personal property, connected with his embassy, are excepted from the rule. And in suing a minister, or serving other process of a court, in relation to real estate, other than his dwelling, or to personal property which has no relation to the embassy, the minister is summoned and proceeded against in the same manner as an absent person, he being reputed out of the country, and his independence does not permit of any immediate address to his person in an authoritative manner, such as sending an officer of a court of justice to him. This question is very clearly discussed by Vattel, as follows: 'What has no affinity with his (the minister's) functions and character, cannot partake of the privileges derived only from his functions and character. Should, then, a minister, as it has been often seen, engage in trade, all the effects, goods, money, and debts, active and passive, belonging to his commerce, come within the jurisdiction of the country. And though this process cannot be directly addressed to the minister's person, by reason of his independency, he is, by the seizing of the effects belonging to his commerce, indirectly brought to a necessity of answering by such seizure. The abuses arising from a contrary practice are manifest.'¹

Of taxes
and
duties

§ 24. The minister's person, and personal effects, are not liable to assessment and taxation. But his real property and his movables (not connected with his mission or embassy) are all subject to taxation, according to the municipal laws of

¹ Vattel, *suprà* ; Kluber, *Europ. Völkerrecht*, § 210 ; Gardien, *De la Diplomatie*, liv. v. §§ 18 et seq. ; Martens, *Précis du Droit des Gens*, § 217 ; Foelix, *Droit Int. Privé*, § 216 ; Heffter, *Droit International*, §§ 215, 217 ; Bello, *Derecho Internacional*, pt. iii. cap. i. § 3 ; Riquelme, *Derecho Púb. Int.*, lib. ii. cap. Ad., 2.

In England the Court of Chancery will restrain a third party from delivering moneys, in dispute, to an ambassador, although the title of the latter to the same may be good in law. (*Gladstone v. Musurus Bey*, 9 *Jure N.S.*, 71.) This preventive jurisdiction is in accordance with the interdict of the civil law, and such appears to have been applicable to legates under the same. (*Dig.*, v. t. i. 28.)

the country. By the usage of most nations, he is exempt from the payment of duties on the importation of articles for his own personal use, and that of his family. But this latter exemption is sometimes limited to a fixed sum per annum, or during the continuance of the mission. The government to which the minister is accredited, and of the country through which he may pass, has a right to adopt and enforce all necessary rules for the protection of its revenue from impositions and fraud, under the guise of importations or exportations, by foreign ministers or their dependents. Hence, goods purporting to be the personal effects of a minister, or for the private use of himself and family, cannot claim a free passage through the custom-houses, even where, by usage, they are exempted from duty. Sometimes regular duties are exacted at ports of entry, and the sums so paid are reimbursed to the minister direct from the national treasury, and, in other cases, the goods are placed under the custom-house seals, and transported to his residence under the direction of custom-house officers. The language of Vattel, on this point, is very clear and just. 'Among those rights,' says he, 'that are not necessary to the success of embassies, there are some likewise not founded on a general consent of nations, but which are, nevertheless, by the custom of several countries, annexed to the character. Such is the exemption from the duties of importation and exportation for things which come into a country for a foreign minister, or which he sends out. There is no necessity for him to be distinguished in this respect, since, by paying these duties, he would not be the less able to discharge his functions. If the sovereign is pleased to exempt him from them, it is a civility which the minister could not claim by any right, no more than that his baggage, or any chests, &c., which he sends for from abroad, should not be searched at the custom-house. Thomas Chaloner, the English ambassador in Spain, sent home a bitter complaint to Queen Elizabeth, his mistress, that the custom-house officers had opened his trunks in order to search them. But the Queen returned him for answer, *that an ambassador was to put up with everything that did not directly offend the dignity of his sovereign.*' So, while the ambassador is exempt from the capitation tax, and every personal imposition relating to the character or quality of a subject of the State, he is expected to pay tolls, postage,

&c., and the ordinary duties imposed on the goods and provisions he may use.¹

**Freedom
of
religious
worship**

§ 25. A minister, resident in a foreign country, is entitled to the privilege of religious worship according to the peculiar forms of his own faith, although it may not be generally tolerated by the laws of the State to which he is accredited. But this right is, in strictness, confined to his own residence ; he can do what he pleases within his own walls, and nobody has a right to object or interfere. ' But if the sovereign of the country where he resides has good reasons for not permitting him to exercise his religion in a manner any way public, this sovereign is not to be blamed, much less accused of offending against the law of nations.' This limitation, which Vattel has placed on the right of religious worship, is approved by other text-writers, although, at this day, no civilised country refuses ambassadors this free exercise, except so far as it might interfere with municipal police regulations for maintaining public order.² ' The increasing spirit of religious freedom and liberality,' says Wheaton, ' has gradually extended this privilege to the establishment, in most countries, of public chapels, attached to the different foreign embassies, in which not only foreigners of the same nation, but even natives of the country of the same religion, are allowed the free exercise of their peculiar worship. This does not, in general, extend to public processions, the use of bells, or other external rights celebrated beyond the walls of the chapel.'³ Privileges of this nature are usually matters of treaty stipulations.

§ 26. Every diplomatic agent, in order to be received in

¹ Vattel, *Droit des Gens*, liv. iv. ch. vii. § 105 ; ch. ix. § 117. The estate of an ambassador domiciled in England is liable to legacy duty. (*Atty.-General v. Kent*, 31 *L.J.*, *N.S.*, 391 ; and see *Heath v. Sampson*, 14 *Beav.*, 441.)

² Wheaton, *Elem. Int. Law*, pt. iii. ch. i. § 21 ; Vattel, *suprà*. In 1678 it was ordered by Parliament that his Majesty be humbly desired to call again on the Foreign Ministers, in England, for an account of the numbers and names and places of abode of the priests that attended them, and also to give orders for some ' effectual means of preventing the scandalous resort of numbers of his subjects to the chapels of Foreign Ministers.'

³ By the Marriage Act, 1890 (53 and 54 Vict., c. 47), every marriage between parties of whom one at least is a British subject which, after January 1, 1891, is solemnised in accordance with the provisions of this Act, in the house of a British minister, within the country to which he is accredited, shall be as valid as if the same had been solemnised within the United Kingdom.

that character, and to enjoy the privileges and honours attached to his rank, must be furnished with a *letter of credence*.^{Letters of credence} Such letter usually states the general object of the mission or appointment, the official character of the agent, and requests that full faith and credit may be given to his acts and deeds, as such agent of his government. The execution of this letter depends upon the municipal laws of the State issuing it, and upon the official rank of the agent. In the case of ministers of the first three classes, the letter is usually signed by the sovereign or chief magistrate of the State which sends them, and is addressed to the sovereign or chief magistrate of the State to which they are delegated. In the case of subordinate agents, it is usually addressed by the minister or secretary of foreign affairs to the department of foreign affairs of the other government.

§ 27. The *full power* authorising the minister to negotiate^{Full power} is sometimes inserted in the letter of credence, but it is more usually drawn up in the form of letters patent. In general, ministers sent to a congress or convention of nations, are not furnished with a letter of credence, but with letters patent, or a full power, of which they reciprocally exchange copies with

¹ The House of Commons of Great Britain has received petitions from *foreigners*, but with the exception of two isolated cases the petitioners were resident in England, and the right of such to petition the House has never been questioned. The first exception was a petition from Dutchmen abroad complaining of grievances under which they suffered. It was presented on February 15, 1648, during the Long Parliament, by Lord Joachimi, ambassador from the Netherlands, at the bar of the House: the mode of presentation was exceptional and the circumstances peculiar. The other case was a petition of the authorised agent, and a foreigner, at Augsburg, the chief representative of the Reimer family in Bavaria, claiming an estate in India, under the British Crown. It was presented by Mr. Dodson, in 1871. With regard to the House of Lords there seems to be no question but that foreigners resident abroad are entitled to petition that House in any appeal. Diplomatic complications, however, might arise if foreign subjects could forward petitions without their coming through their own authorities. There are cases in which petitions have been received by the Government direct from the petitioners, as in the case of the Nestorian Christians, the Wallachians, and Circassians, but their applications were not presented to Parliament as *petitions*. In 1873, a petition from Boulogne, in France, and signed by English and by French subjects, was sent direct to the British Foreign Office, and a similar petition was received from Tours in 1875.

In 1849, rules were drawn up that all foreign ambassadors should address through the Foreign Office. Colonists may petition direct. In 1827, Lord John Russell presented a petition from the inhabitants of Crete, who thought themselves included in the Treaty of 1827. It was an address to the British nation, not to Parliament, and was not received by the House of Commons.

each other on the assembling of the congress. But a *full power* to negotiate does not necessarily bind the State to the treaty which may be signed by the minister under such power. It not unfrequently happens that the power of ratifying or rejecting a treaty, is vested in other authorities than that which conferred the power to negotiate. Thus, in the United States the power to negotiate is conferred by the President, but no treaty is binding till confirmed by two-thirds of the senate.

**Instruc-
tions**

§ 28. The instructions of a minister, from his own government, are for his own direction only, and are not to be communicated to the government or congress to which he is delegated. He cannot be compelled to show them. He, however, may be directed by his own government to communicate them either partially or *in extenso*, or it may be left to his own discretion to communicate them or not, as he may deem expedient. But, without such permission, specially given, diplomatic instructions are always regarded as confidential communications, with the contents of which the government to which he is credited has no right to be made acquainted. Instances have occurred where ignorant and unskilful ministers have communicated such instructions without authority, to the embarrassment and injury of their own government.

**Notifi-
cation of
appoint-
ments**

§ 29. It is the duty of every diplomatic agent, on his arrival at his destined post, to notify the government to which he is accredited. In case of a minister of one of the higher classes, he is furnished with a duly authenticated copy of his letter of credence, which is delivered to the minister of foreign affairs, requesting an audience of the sovereign or chief magistrate of the State, for the purpose of delivering the original letter of credence. *Chargés d'affaires*, and other subordinate agents, notify their arrival to the minister of foreign affairs by letter, at the same time requesting an audience of the minister for the purpose of delivering their letters to him.

**Presenta-
tion and
reception**

§ 30. The ceremony of *solemn entry*, which was formerly practised with respect to ambassadors and other ministers of the first class, is now usually dispensed with, and they are received in a *private* audience in the same manner as other ministers. On their presentation, by the minister of foreign affairs, they usually deliver their original letter of credence

(which is returned to them), and pronounce a short complimentary discourse, which is replied to by the sovereign or chief of the State, to whom they are presented. Such presentation and reception is a sufficient acknowledgment of their official character to enable them to enter on their functions.¹ Each court has its particular ceremonial for the presentation and reception of foreign ministers, which such ministers conform to as a matter of etiquette.

§ 31. Although the minister's character is not declared in its whole extent, so as to secure to him the enjoyment of all his rights, till he has had his audience and been acknowledged and admitted by the chief authority of the State to which he is accredited, he is, nevertheless, under the protection of the law of nations from the date of receiving his letter of credence, or official document of appointment. In passing through the country to which he is sent, in order to reach his destined post, he only requires, in time of peace, a passport from his own government, certifying to his official character. But in time of war he must be provided with a safe-conduct, or passport, from the government of the State with which his own country is in hostility, to enable him to travel securely through its territories. A refusal to give such safe-conduct is a virtual refusal to receive or admit such ministers. 'If they undertake,' says Vattel, 'to pass privately, and without permission, into places belonging to their master's enemy, they are liable to be arrested; and of this the last war furnished a signal instance. An ambassador of France, going to Berlin, by the imprudence of his guides, took his way through a village within the electorate of Hanover, of which the sovereign, the king of England, was at war with France. He was arrested, and afterward sent over to England. As his Britannic Majesty had herein only made use of the rights of war, neither the court of France nor that of Prussia complained of it.'² Other instances of the detention of a sovereign or am-

Passports
and safe-
conduct

¹ Ambassadors are not always to be received, either on account of the person sending, or of the person sent. Thus the Pope refused to receive the ambassador of Henry II., who was sent after the death of Thomas à Becket, on account of the person sending; and the people of Gaunt refused to receive an ambassador from Louis XI. of France, on account of the person sent, who was a barber. In January, 1793, the French ambassador, M. Chauvelin, was ordered to quit England, as being the representative of a regicide government. (James, *Nav. Hist.*, vol. i. p. 46.)

² Flassan, *Hist. Dip. Fran.*, tome v. p. 246.

bassador are found in the arrest of Richard I. of England (he having no safe-conduct) by the Duke of Austria in 1192 ; the arrest of the English ambassador to Venice while passing through Austria ; the case of the Earl of Holderness, 1744 ;¹ the arrest of the ambassador from the Court of Brittany to England while passing through France in 1464 ; the arrest of the plenipotentiaries from France to Switzerland and Naples while passing through Austria in 1793.

Passing
through
other
States

§ 32. In passing through the territory of a friendly State, other than that of the government to which he is accredited, a public minister, or other diplomatic agent, is entitled to the respect and protection due to his official character, though not invested with all the privileges and immunities which he enjoys in the country to whose government he is sent. He has a right of innocent passage through the dominions of all States friendly to his own country, and to the honours and protection which nations reciprocally owe to each other's diplomatic agents, according to the dignity of their rank and official character.² If the State through which he purposes to pass has just reason to suspect his object to be unfriendly, or to apprehend that he will abuse this right by inciting its people to insurrection, furnishing intelligence to its enemies, or plotting against the safety of the government, it may very properly, and without just offence, refuse such innocent passage. But if an innocent passage is granted (and it is always presumed to be by a friendly power, unless specially denied), he is entitled to respect and protection, and any insult or injury to him is regarded as an insult or injury, both to the State which sends him, and that to which he is sent. The following remarks of Vattel on the assassination of the French ministers, on the Po, are both appropriate and just:—‘ Francis I., king of France, had all the reason in the world to complain of the murder of his ambassadors, Rincon and Fregose, as a horrible crime against public faith and the law of nations. These two persons, destined, the one to Constantinople and the other to Venice, having embarked on the Po, were stopped and murdered, in appearance by order of the governor of Milan. The negligence of the Emperor Charles V. to discover the author of the murder, gave room to think that he

¹ De Martens, C. C., ii. App., 479.

² For the case of the ‘ Trent,’ see *post.*, ch. xxvi.

had ordered it, or, at least, that he had tacitly approved of the act. And as he did not give suitable satisfaction concerning it, Francis I. had a very just cause for declaring war against him, and even for demanding the assistance of all other nations. For an affair of this nature is not a particular difference, or a litigious question, in which each party wrests the law over to his side; it is a quarrel of all nations who are concerned to maintain, as sacred, the right and means of communicating together, and treating of their affairs.' In time of general war or public danger, and when peculiar caution is necessary to be observed in the admission of strangers within a country, although an innocent passage is not often refused to a foreign minister, or other diplomatic agent, yet it is not unusual or improper in such cases to restrict it within very narrow limits by prescribing the particular route he must travel. Thus, at the famous congress of Westphalia, whilst peace was negotiating amidst the dangers of war and the noise of arms, the routes of the several couriers sent or received by the plenipotentiaries were marked, and out of such limits their passports were of no protection. The Spaniards found similar maxims to prevail even in Mexico and the neighbouring countries. The ambassadors were respected all along the road, but if they went out of the highway they were to forfeit their rights. Such reservations are sometimes necessary to guard against spies being sent into a country, under the guise of diplomatic agents.¹

§ 33. The public mission of a minister may be terminated in various ways, as, for example, by his death, by the expiration of the period of his appointment, by the termination of the special negotiation or object of the mission, by his recall, by the death of his sovereign, or a radical change in the sovereignty or government of his State, by a change in his diplomatic rank, by his own withdrawal, and termination of his mission, or by his dismissal by the government to which he is accredited. Custom has established particular forms of proceedings applicable to each case, which forms are followed

Termination of public missions

¹ Vattel, *Droit des Gens*, liv. iv. ch. vii. §§ 84, 85; Martens, *Causes Célèbres*, tome i. p. 310; Phillimore, *On Int. Law*, vol. ii. §§ 172-175; Garden, *De la Diplomatie*, liv. v. § 26; Heffter, *Droit International*, §§ 204, 212; Rayneval, *Institutions*, &c., Appen. No. 2; Wicquefort, *De l'Ambassadeur*, liv. i. § 29; Grotius, *De Jure Bel. ac Pac.*, lib. iv. cap. xviii. § 5; Miruss, *Das Europ. Gesandtschaftsrecht*, § 365.

as a matter of etiquette, rather than of strict right or obligation. When, by any of the circumstances above mentioned, the minister is suspended from his functions, and in whatever manner his mission is terminated, he still remains entitled by courtesy to all the privileges of his public character until his return to his native country. The time, however, may be limited for such return, at the termination of which his privileges will cease.

By death
of the
minister

§ 34. Where the mission is terminated by the death of the minister, the secretary of legation, or, if there be no secretary, the minister of some allied or friendly power, places seals¹ upon his effects, takes charge of his body, and makes the arrangements for its interment, or for sending it home. The local authorities do not interfere unless in case of necessity. All the honours and respect due to the minister while living, are usually paid to his remains;² and, although, in strictness, the personal privileges of his dependents expire with the termination of his mission by death, the usage of nations extends to the widow, family, and domestics of a deceased minister, for a limited period, the same immunities which they enjoyed during his lifetime. The validity of his testament, and disposition of his movable property, *ab intestato*, must be determined by the laws of his own country, on the principle of the extra-territoriality of his residence.³

¹ During the war of 1870 the British Government agreed with France to undertake the protection of the French in Prussia, after ascertaining, as a matter of form and courtesy, that such a course would be agreeable to the Prussian Government. The archives of the French Embassy were sealed up and delivered to the English ambassador. (*Journal Officiel*, July 24.)

² Extract from the *Regulations for the Government of all Persons attached to the Naval Service of the United States*, August 7, 1876, ch. iv. § vi. :—

‘17. Should a Minister or a Chargé d’Affaires of the United States die in a foreign port, where one or more vessels of the United States are present, the senior officer present will request permission of the authorities to land an escort; as many officers as can be spared from duty will attend the funeral, in undress uniform, and eight petty officers will be landed as body-bearers. The colours of the vessels present are to be kept at half-mast from 8 A.M. of the day of the funeral to the time of interment, and the same number of cannon are to be fired, as minute guns, as the official was entitled to as a salute while living, the firing to commence on the starting of the funeral *cortège*.’

³ Wheaton, *Elem. Int. Law*, pt. iii. ch. i. § 23; Martens, *Guide Diplomatique*, §§ 60–65; Horne, *On Diplomacy*, sect. vii. §§ 54–57; Heffter, *Droit International*, § 225; Moser, *Versuch*, &c., B. 6, pp. 192, 569; Miruss, *Das Europ. Gesandt.*, &c., §§ 180–182; Riquelme, *Derecho Púb. Int.*, lib. ii. caps. Ad., i. ii.; Réal, *Science du Gouvernement*, tome v. p. 337.

§ 35. Where the mission is terminated by an ordinary formal letter of recall, nearly the same formalities are observed as on the arrival of the minister at the court to which he is accredited. He delivers a copy of his letter of recall to the minister or secretary of foreign affairs, and asks an audience of the sovereign or chief executive for the purpose of taking leave. At this audience he delivers or exhibits the original of his recall, and takes his leave with a complimentary address suited to the occasion, and to which a complimentary reply is usually made. But if he is recalled at the request of the government to which he is accredited, for misconduct or other objections, he would neither ask nor receive an audience of leave. If recalled on account of a misunderstanding between the two governments, the peculiar circumstances of the case must determine whether a formal letter of recall is to be sent to him, or whether he may quit the residence without waiting for it; whether the minister is to demand, and whether the sovereign is to grant him, an audience of leave.

Martens relates (t. ii. 110) that in 1772 the minister plenipotentiary of the Landgrave of Hesse-Cassel to France was called home. He was much in debt, and his French creditors succeeded in prevailing on the Minister for Foreign Affairs to refuse to grant him his passport until their debts were satisfied. And this was done, but not without the protest of all the other foreign ministers in Paris.

§ 36. When the mission is terminated by the expiration of the minister's appointment, as in the case of embassies of mere ceremony, or of special negotiations which have been accomplished or have failed, a formal letter of recall is not usually sent to the minister by his own government. But the formalities of taking leave are nearly the same as in case of an ordinary recall by letter. Where the diplomatic rank of the minister is raised or lowered, as where an envoy becomes an ambassador, or an ambassador has fulfilled his functions as such, and is to remain as a minister of the second or third class, he presents his letter of recall, and a letter of credence in his new character.

§ 37. Where the mission terminates by the decease or abdication of the minister's own sovereign, or the sovereign to whom he is accredited, it is usual for him to await a renewal of his letters of credence. In the former case, a mere

notification of the continuance of his appointment is sent by the successor of the deceased or deposed sovereign, and in the latter, new letters of credence are sent to the minister to be presented to the new ruler. If a radical change should take place in the character or organisation of his own government, it would be the duty of the minister to await new letters of credence, or a ratification of his appointment by the new government. The government to which he is accredited would be justified in declining any new negotiations with him without such ratification, or new appointment, or, at least, without some evidence of a renewal or continuance of his powers.

By his
dismissal

§ 38. When, on account of the measures of his government, the court at which he resides thinks fit to discontinue all diplomatic intercourse with a minister, this is usually done by a diplomatic note informing him of that fact, and offering him his passport. But when the court at which he resides thinks fit to send him away on account of his own misconduct, it is usual to notify his government that he is no longer an acceptable representative, and to request his recall. If the offence be of an aggravated character, he may be dismissed without waiting for a recall by his own government. The government asking such a recall may, or may not, at its own option, state the reasons for the request; they cannot be required. It is sufficient that he is no longer acceptable. In such a case international courtesy would require his immediate recall. If, however, the request should not be complied with, his dismissal would follow as a matter of course. This is done by a simple notification and the offer of his passport. The dismissal of a public minister for personal or official misconduct, is not an act of disrespect or hostility to the government which sent him, and cannot be made a cause of war. No State has a right to send to, or continue at, another court, a minister who is personally unacceptable to that court; an attempt to do so is, in itself, a mark of disrespect and unfriendliness. If the government to which a minister is accredited, refuses to receive him, his position is similar to that of one who is recalled or dismissed; that is, he has no ministerial powers, but retains his privileges and the exemptions of his ex-territoriality so long as he remains in the country. But the time of his remaining may be limited to a particular

period, after the expiration of which his diplomatic privileges cease ; or if he engage in, or contemplate, any act not consonant with the laws, the peace, or the public honour of the country to which he was accredited, the courtesy of transit may be withdrawn. The diplomatic character will not be allowed to be made a cloak for the infringement of international or municipal laws.¹ In 1848, Sir Henry Bulwer, the British ambassador in Spain, was supposed by the Spanish Government to be lending aid to some disaffected persons, and thereby to be causing disturbances in different parts of that country. His passport was given to him, and he was requested by the Spanish Government to leave Spain. This incident caused a rupture in diplomatic relations between the two countries for two years. Again, in 1888, Lord Sackville, the British minister to the United States, having received a letter from a private person asking advice as to which party the writer should support at the approaching election of President, and also casting reflections on the rejection of the Fisheries Treaty, Lord Sackville replied in a letter marked 'Private,' in which, among other things, he spoke of the rejection of the treaty as 'unfortunate.' Lord Sackville also was accused of having impugned the Government of the United States, in interviews with reporters. The United States Government, considering that the above-mentioned answer of Lord Sackville sanctioned the tone of the letter addressed to him, and threatened the dignity, security, and independence of the States, called the attention of the British Government to the above facts. Lord Salisbury considered that it was hardly practicable to lay down the principle that a minister is prohibited from privately expressing his opinions on passing events in the country to which he is accredited, and stated that he was awaiting Lord Sackville's explanation of the expressions said to be used by him to newspaper reporters. But meanwhile the United States Government sent Lord Sackville his passports. This matter caused the legation to be left without a minister until after the formal installation of the new President in the following year, the first secretary meanwhile performing the duties of the minister. The matter

¹ *Cong. Doc.*, 34 Cong., 1st Sess. H. of R., *Ex Doc.*, No. 107 ; Cushing, *Opinions of U.S. Attys.-Genl.*, vol. viii. pp. 417, 473 ; Merlin, *Répertoire*, verb. 'Ministre Public,' § 5.

was, however, supposed to be based on political reasons connected with the then approaching election.

Respect
due to
local au-
thorities

§ 39. All ministers and diplomatic agents, of whatever description, are bound to respect the government and authorities of the country where they reside. Any disrespect, on the part of such officers or agents, is good and sufficient cause for asking their recall ; or, in aggravated cases, for dismissing them and sending them out of the country. Such offences are seldom, if ever, committed by diplomatists of character and experience ; but, where a State appoints, as its representatives at foreign courts, men who do not possess the requisite qualifications for the office, it is liable not only to occasional mortifications at the conduct of such agents, but to the risk of being unnecessarily involved in serious international difficulties. Indeed, nations are not unfrequently involved in long and bloody wars through the faults and unskilfulness of their public ministers and diplomatic agents.¹

¹ Bello, *Derecho Internacional*, pt. iii. cap. ii. § 1 ; Heffter, *Droit International*, §§ 206, 207, 232 ; Wicquefort, *De l'Ambassadeur*, &c., liv. i. § 20.

General Bonaparte, at a reception at the Tuileries, went straight up to the British ambassador and put several hurried questions to him concerning the policy of the British Cabinet in a tone of anger. The ambassador made a respectful bow, but gave no reply. (*Mem. of Rov.*, vol. i.)

CHAPTER XI

OF CONSULS AND COMMERCIAL AGENTS

1. Origin of the institution of consuls—2. Objects of consulates in modern times—3. Divisions of the consular organisation—4. Commission and exequatur—5. Consuls have no representative or diplomatic character—6. Are subject to local jurisdiction—7. Have no rank except among themselves—8. Enjoy certain privileges and exemptions—9. The office to be distinguished from the personal status of the officer—10. If exequatur be issued to a citizen without conditions—11. Opinions of text-writers—12. U. S. laws respecting foreign consuls—13. Duties and powers respecting their own countrymen—14. They have no civil or criminal jurisdiction—15. The granting of passports—16. Certificates, acknowledgments, &c.—17. Can afford no refuge from civil process—18. Engaging in trade—19. Judicial decisions on public character of consuls—20. Powers and privileges extended by treaty and municipal law—21. Consuls of Christian States in the East—22. Opinion of Mr. Attorney-General Cushing—23. System extended to China and elsewhere—24. Foreign Jurisdiction Act—25. Treaties with Japan—26. French laws and regulations—27. Remarks of U. S. commissioner on treaty of 1844—28. Acts of Congress for carrying treaties into effect—29. Controversies between subjects of foreign States in Oriental countries—30. International Courts of Egypt—31. Constitution of these tribunals.

§ 1. THE institution of a foreign consulate originated in the earlier part of the middle ages, in sending officers or persons from one country or city to the seaports and towns of foreign States, for the purpose of protecting the national commerce, especially in matters of shipwreck and of adjusting disputes between sailors and merchants of their own country. In the absence of regular ambassadors, or other public ministers, these commercial agents sometimes acted in the capacity of representatives and diplomatic agents of their respective States, and not unfrequently assumed and exercised jurisdiction and authority over the merchants and citizens of their own countries in foreign ports and cities. In the ports of the Baltic and Mediterranean, where foreigners were compelled to live in particular quarters of the town, they sometimes exercised great power over their own countrymen, and were

Origin of
the insti-
tution of
consuls

designated by various titles, according to the customs of various countries.¹

General
powers in
modern
times

§ 2. In the early part of the seventeenth century a great change was effected in commerce and international intercourse generally, by the establishment of permanent diplomatic agencies and legations, by the general improvement of municipal law, and especially by more clearly defining the boundaries and limits of territorial and foreign jurisdictions. The extra-territorial jurisdiction, criminal and civil, exercised by consuls, was found to be wholly at variance with the recognised principles of public law in Christian Europe, and the consular institution, thus changed in its condition and character, was limited to a general vigilance of the consul over the interests of shipping and navigation of his nation at a particular locality. To this was sometimes added a limited authority over particular questions of dispute between merchants and sailors of his own country. This is the general position which, in Christian countries, the consulate continues to occupy at the present day. The duties and legal *status* of consuls, as will be shown hereafter, are somewhat different in the East, where, by virtue of express treaty stipulations, they have especial prerogatives and exercise a larger jurisdiction.²

¹ The ships of foreign merchants were held to be navigated under the jurisdiction of the nation whose flag they carried, and the general practice was for vessels engaged in long sea voyages, some of which occupied a period of not less than three years, to have on board a magistrate whose duty it was to administer the law of the country of the flag amongst all on board, not merely whilst the vessel was on the high seas, but while she was in a foreign port, loading or unloading cargo. This magistrate was termed the Alderman in the ports of the Baltic and the North Sea, whilst in the Mediterranean ports he was designated by the familiar name of Consul, and was the precursor of the resident commercial Consul, who continues in the present day to exercise within merchant ships of his own nationality, notwithstanding they are within the territorial jurisdiction of another State, a portion of the personal jurisdiction formerly exercised by the ship's consul. The exercise of this consular jurisdiction requires no fiction of extritoriality to support it. Its limits are either regulated by commercial treaties, or where it has originated in charter privileges, it is now held to rest upon custom. (Art. by Sir T. Twiss, *Law Magazine*, February, 1876. See the 'Newton' and 'Sally' as to consular authority in a foreign port, Ortolan, *Dipl. de la Mer* (1864), vol. i. p. 217, and Annexe J, p. 445.)

² Heffter, *Droit International*, § 244; Phillimore, *On Int. Law*, vol. ii. §§ 243, 244; Miltitz, *Manuel des Consuls*, tome i. p. 6; Martens, *Guide Diplomatique*, §§ 71, 72; Martens, *Précis du Droit des Gens*, §§ 147, 148; Garden, *De la Diplomatie*, tome i. pp. 315 et seq.; De Clercq, *Guide des Consulats*, pp. 1 et seq.; Bello, *Derecho Internacional*, pt. i. cap. vii.

§ 3. The consular organisation is usually divided into consuls-general, consuls, vice-consuls, and consular or commercial agents. Some States have only the single office of consuls. Consuls-general exercise their functions over several places, and sometimes over a whole country, giving orders and directions to all consuls, vice-consuls, and commercial agents of their government within the same State. English vice-consuls are usually appointed by the consul, subject to the approbation of the foreign secretary of State. Other countries have adopted a different system of appointment. This depends entirely upon the institutions of the particular State, and is not governed by any rule of international jurisprudence. It is sufficient for the State, to which the consular officer is sent, to know that he has been appointed by the proper authority of his own government. By whatever names these officers are designated, their powers and duties in Christian countries are, generally speaking, the same ; these we shall now proceed to discuss under the general name of *consul*.

§ 4. A consul receives a commission from the proper authority of his own government, a duplicate, or properly authenticated copy, being forwarded to the ambassador or minister of the same State, at the court of the country in which the consul is to officiate, in order that he may apply for the usual *exequatur* to enable him to enter officially upon his consular duties.¹ This is usually issued under the great seal of State, and made public for the information of all concerned. On arriving at his post, the consul usually furnishes the principal public authority of the place with a copy of his commission, stamped with his consular seal. On receiving

§ 1 ; Moreuil, *Manuel des Agents Con.*, introduction ; Mensch, *Manuel du Consulat*, pt. i. ; Riquelme, *Derecho Púb. Int.*, lib. ii. cap. Ad., iii. ; Dalloz, *Répertoire*, verb. 'Consul,' § 1 ; Warden, *Treatise on Consuls* ; Borel, *Fonctions des Consuls* ; Santos et Barreto, *Traité du Consulat* ; Bursotti, *Guide des Agents Consulaires* ; De Podio, *Juridiction des Consuls* ; Bynkershoek, *De Foro Legat.*, lib. v. cap. x. ; Vattel, *Droit des Gens*, liv. ii. ch. ii. § 34.

¹ The British Government refused the *exequatur*, in 1869, to one Major Haggerty (who had been sent by the United States as consul to Glasgow), because he had been mixed up in Fenian intrigues. The United States Government, in 1866, withdrew the *exequatur* from one Janssen, Consul for Oldenburg, because he had refused to appear before the Supreme Court of the State of New York, to defend an action brought against him, on the ground that he was a consular officer.

his *exequatur* he becomes entitled to exercise the authority, and enjoy the privileges, immunities, and exemptions due and pertaining to his office. Without such *exequatur*, or confirmation of their commission by the sovereign authority of the country to which they are deputed, they cannot enter upon the discharge of their functions; and, on its revocation by such sovereign authority, their official character immediately ceases.¹

Consuls
have no
diplomatic
character

§ 5. Consuls have neither the representative nor diplomatic character of public ministers. They have no right of extra-territoriality, and therefore cannot claim either for themselves, their families, houses, or property, the privileges of exemption which, by this fiction of law, are accorded to diplomatic agents who are considered as representing, in a greater or less degree, the sovereignty of the State which appoints them. They, however, are officers of a foreign State, and when recognised as such by the *exequatur* of the State in which they exercise their functions, they are under the special protection of the law of nations. Consuls are sometimes also made *chargés d'affaires*, in which cases they are furnished with credentials, and enjoy diplomatic privileges; but these result only from their character as *chargés*, and not as consuls.²

Are
subject to
local ju-
risdiction

§ 6. Consuls are amenable, generally, to the civil and criminal jurisdiction of the country in which they reside, and their property and effects are subject to the recourse of execution and process of the local courts. It was at one time contended that they should be exempt from criminal jurisdiction, but the position was neither sustained in practice, nor in the doctrines of text-writers. They, therefore, may either be punished for their offences, by the laws of the State where they reside, or be sent back to their own country, at the

¹ Fynn, *British Consuls Abroad*, pp. 34-55; Wildman, *Int. Law*, vol. i. p. 130; Horne, *On Diplomacy*, sec. i. §§ 13, 14; De Cussy, *Reg. Consulaires*, pt. i. sect. i.

² Kent, *Com. on Amer. Law*, vol. i. p. 54; Foelix, *Droit Int. Privé*, § 218; Flassan, *Hist. de la Dip. Française*, tome i. ch. ix.; Wheaton, *Elem. Int. Law*, pt. iii. ch. i. § 22; Westlake, *Private Int. Law*, § 139.

Mr. Pritchard, the acting British Consul at Tahiti, having been imprisoned in 1844 by order of the French commander of that island, although without the authority of the French Government, the latter was compelled by Great Britain to pay a sum of money as indemnity for the outrage. (*Ann. Reg.*, 1844, p. 261.)

discretion of the government which they have offended. A distinction, however, is made between personal offences and official acts done under the authority and direction of their own government. The latter are matters for diplomatic arrangement between the respective States, and are not properly justiciable by the local courts. Consuls are subject to the payment of taxes, and municipal imposts and duties on their property or trade, and the municipal charges incident to their personal *status*, and from which they are not exempted by the privileges of their office.¹

§ 7. 'Consuls,' says Phillimore, 'have no claim to any foreign ceremonial or mark of respect, and no right of precedence, except among themselves, according to the rank of the different States to which they belong.'² But, as already stated, the present tendency is to consider all sovereign and independent States as equal in rank, with respect to ceremonial and precedence, and consuls of foreign States of the same rank in the consular hierarchy should have precedence among themselves, according to the dates of their respective *exequaturs*. The rank which they hold among the officers of their own State, civil or military, is regulated by the laws of their own State, and is not a matter of international jurisprudence, nor does it come within the province of the State where they reside to interfere in any differences between officers of a foreign government, with respect either to relative rank among themselves, or to their authority over each other.³

They have
no rank
except
among
them-
selves

¹ Wicquefort, *De l'Ambass.*, liv. i. § 5; Clark v. Cretico, 1 *Taunt. R.*, 106.

² Phillimore, *On Int. Law*, vol. ii. § 246.

³ British Consular Officers take rank in their respective grades among their colleagues at the port of their residence, in conformity with the rules prescribed by the Congress of Vienna for diplomatic agents, viz., seniority according to official title and to priority of recognition. The rights and privileges of Consular Officers are of two kinds: those defined by treaty and those regulated by local law or custom. Consular Officers should maintain their right to privileges or exemptions which by treaty or by custom they may be fully entitled to demand, but they must not aim at more; and in any case of difference of opinion between them and the officers of other Governments, they must avoid giving offence, and should conduct the controversy in a spirit of conciliation calculated to render unnecessary the reference which, if the difference cannot be arranged, must be made by the Consular Officer to the British Secretary of State.

In the countries where it may be the custom for foreign Consuls to hoist the national flags of their respective nations over their residences, the flag to be hoisted by British Consular Officers is the Union Jack.

If the regulations of the country or of the place in which the Consular

Enjoy
certain
rights and
exemptions

§ 8. Although consuls do not enjoy the rights accorded by the law of nations to public ministers, they are sometimes entitled to certain rights of comity, and to certain privileges of exemption from local and political obligations, which cannot be claimed by private individuals—privileges which are incident to their office, and which result from their character as the duly appointed and recognised officers of a foreign State, but which are not recognised by Great Britain. Thus sometimes they may raise the flag, and place the arms of the country they represent over their gates and doors; and, although their houses are liable to domiciliary visit and search, the papers and archives of their consulate are, in general, exempt from seizure or detention, and soldiers cannot be quartered in their consular residence. In addition to

Officer resides do not permit a display of this kind, and if such regulations are applicable to foreign Consuls generally, the British Consular Officer should not hoist the British flag. (*Brit. O. F. Inst.*)

The interchange of visits in foreign ports between British Naval Officers and British Consuls is arranged as follows :—

On arrival of a British ship of war at a foreign port, the first visit is made by the Naval or Consular Officer who may be subordinate in relative rank; but the senior Naval Officer present is on all occasions to arrange to provide a suitable boat for Consular Officers to pay their official visits afloat, and to reland them, on the said officers notifying their wish to have a boat sent for their accommodation.

The above ceremonial is dependent on the relative rank accorded to certain Naval and Consular Officers, and such relative rank having undergone several changes since the Naval Regulations were established, the following scale of precedence between Naval and Consular Officers has been substituted :—

Agents and Consuls-General	To rank with, but after, Rear-Admirals.
Consuls-General	„ with, but after, Commodores.
Consuls	„ with, but after, Captains R.N. of 3 years' standing and before all other Captains R.N.
Vice-Consuls	„ with, but after, Lieutenants and Navigating Lieutenants of 8 years' standing.
Consular Agents	„ with, but after, all other Lieutenants, and Navigating Lieutenants R.N.

The Consular Officers of the United States rank with their own Naval Officers as follows :—

Agents and Consuls-General	} with Commodores.
Consuls-General	
Consuls and Commercial Agents	} with Captains.
Vice-Consuls	
Deputy-Consuls	} with Lieutenants.
Consular Agents	
Commercial Agents	

these privileges custom, in some countries, has added others of the same kind ; and, in general, a consul is entitled to all those which have been allowed to his predecessors, unless a formal notice has been given that they will no longer be extended to his office, or to consuls of other States in the country where he resides. To grant privileges and immunities to consuls of one country, which are not allowed to those of another, may give just cause of complaint. It, however, is necessary to distinguish between what they are absolutely entitled to by the rules of international law, and what is sometimes allowed as a matter of comity, or conceded by treaty stipulations.

§ 9. It is conceded that, so far as the law of nations has established fixed rules with respect to consular exemptions, the subject is withdrawn from the domain of municipal jurisprudence, and the officer may claim all the rights and privileges which are accorded to him by that general and higher code under the protection of which his office is placed. But there has been much difference of opinion among writers on international law, respecting what rights and exemptions are accorded to consuls by that code. This difference of opinion, however, seems to have arisen, in a great degree, from not distinguishing between those which result from the personal *status* of the officer, and those which pertain to the office, and, with respect to the latter, between those which are conceded by treaty or municipal law, and those which are established by the positive law of nations, or the general rules of international comity. In considering their rights and privileges of exemption, consuls may be divided into three distinct classes : first, those of foreign birth sent to a country especially as consuls, who owe no allegiance to the State where they reside, and who hold no property, engage in no business, and have no residence there, other than their official one; second, those of foreign birth and allegiance, who hold property, engage in business, and have a fixed residence in the country ; and third, those who are citizens and residents of the country in which they exercise the functions of the consular office, under a foreign government. It is manifest that the rights and privileges of these different classes of persons must be essentially different, and according to the personal *status* of each. Nevertheless, all must alike have certain

Office
disting-
guished
from
status of
officers

rights and privileges which belong to the *office* which they hold, and which are independent of the character of the individual incumbent. A neglect of this distinction has led to much of the conflict of opinion among publicists ; it must, however, be admitted that there is not an entire uniformity of opinion among those who make the proper distinction between the office and the person. And, indeed, this could hardly be expected, for upon nearly every important question of international law text-writers have held different doctrines.¹

When
they are
foreigners

§ 10. There seems to be little or no difficulty in distinguishing between the exemptions of the different classes of foreign consuls who owe no allegiance to the State in which they reside. Those who hold no property, engage in no business, and have no domicile in the country, have the personal exemptions and disabilities of aliens who are mere sojourners. Those who hold real estate, engage in business, and have a fixed residence, are considered as foreigners domiciled in the country, and their consular privileges, or the privileges which pertain to their office, whatever they may be, do not extend to their property or trade so as to change its national character. As neither of these classes owe personal allegiance to the country in which they reside, there can be no conflict between the duties of their allegiance and the duties of their office. But where citizens of the country exercise the functions of foreign consuls, there may be such conflict, and it becomes material to ascertain how far the office which they hold exempts them from the performance of the political and municipal duties of citizens. It is evident that they can claim none of the exemptions which the other two classes enjoy in virtue of the personal *status* as aliens ; but it is believed that they are entitled to those which pertain to their office, and which are necessary for the due performance of its duties. It has been stated, in the preceding chapter, that where a public minister owes allegiance to the State to which he is accredited, such State may refuse to receive him, except on condition of his renouncing any claim to be exempt from local jurisdiction, and that, on making such renouncement, he loses his right of extra-territoriality,

¹ Wicquefort, *De l'Ambassadeur*, liv. i. § 5 ; Garden, *De la Diplomatie*, tome i. p. 323 ; Martens, *Guide Diplomatique*, tome i. § 74 ; De Clercq, *Guide des Consuls*, liv. i. ch. i. § 4 ; Mensch, *Guide du Consulat*, pt. i. ch. iv. ; Riquelme, *Derecho Púb. Int.*, lib. ii. cap. Ad., iii.

but if he be received without conditions, he has the same rights as though he owed no allegiance to the State which receives him. It is true that consuls have no right of extra-territoriality, but they have certain rights and privileges which pertain to their office and which are accorded to them by the law of nations, just as much as the right of extra-territoriality belongs and is accorded to a public minister. Where a citizen of a State is appointed to a foreign consulate in the State, it is optional with his government to refuse to permit him to hold the office, or to attach conditions to his holding it. But suppose he be recognised as such consul without any conditions. Reason and analogy would lead us to the conclusion that, if no conditions are imposed in the *exequatur*, the citizen who is consul of a foreign State is entitled, as much as an alien consul, to the privileges and exemptions which necessarily pertain to that office ; and it is believed that this conclusion is sustained by the authority of text-writers. The difficulty is to determine what privileges and exemptions properly pertain to the office of consul, or are necessary for the due performance of its duties.

§ 11. The consulate, as it now exists in Christian countries, being of modern origin, and having, in a measure, grown up with the development of commerce, we cannot expect to find, in the older works on international law, any very clear discussion of the duties and privileges which pertain to the consular office. On this point we must look mainly to the writings of more recent publicists, and even these are very far from satisfactory, the opinions and doctrines which they announce being often conflicting and sometimes totally irreconcilable. Horne says that consuls, whether aliens or subjects of the State in which they reside, 'enjoy exemption from taxes and personal services, and their houses are exempt from the burthen of lodging troops.' He also says that citizens cannot accept a consulate of a foreign power without the permission of their own government, but that, having received such permission, they cease, temporarily, to be subjects of the prince in whose territory they reside. This last doctrine is not sustained by the authorities to which he refers, nor is he correct in stating that consuls are exempt from taxes. Mr. Cushing has gone to the opposite extreme, with respect to citizens who hold consulates of foreign States. It

is true that his argument has reference only to their liability to do militia and jury duties, but his doctrine is, that they are exempt from no municipal duty, unless exempted by the local laws of their own State. The more correct and reasonable rule is that laid down by Garden. He says : 'Consuls are under the protection of the law of nations ; they, undoubtedly, do not enjoy the rights accorded to envoys ; they may be subjects of the State where they reside ; they are subject to its jurisdiction, to its police, to imposts, *but they cannot be denied the privileges necessary to the performance of their office.* The consul, therefore, cannot be made liable to civil charges which would prevent him from the performance of his functions.' With respect to jury and military duty, their right of exemption depends entirely upon the question whether such duties would interfere with the due performance of their consular functions. On this point Baron Charles de Martens, speaking of consuls who do not owe allegiance, hold no real estate, and have no business in the State where they reside, says that they are exempt from service in the civic or municipal guard, and from contributions for that service ; and, with respect to those who hold real estate, or engage in trade in the country, or are its subjects and residents, he says they may, if they demand it, be exempted from personal service in the national guard, although, if necessary, they may be required to provide a substitute. De Clercq says that consuls are exempt from service in the national guard, when they are citizens of the State which they represent, and that jurisprudence tends to exempt them from it, even when citizens of the State where they reside. The same opinion is expressed by Mensch and others, viz. : that consuls must be regarded as exempt from services purely *personal*, which interfere with their *consular* duties. We are of the opinion that jury and militia duty come within the rule of exemption so clearly laid down by Garden. The duties of a juryman might require the officer to go a considerable distance from his consulate, and prevent him, for days and weeks, from performing the functions of his office. It is still worse with respect to militia duty, and especially in the United States, where militia service in a State would render him liable to be mustered into the service of the general government, and take him a great distance, and for a long time, from his consulate. Certainly this would

be an interference with his performing the duties of his office. Again, the same principle which would require him to perform jury and militia duty, would require him to perform the duties of other municipal offices. In many countries the acceptance of such offices is obligatory upon the citizen, and, as their terms are sometimes for years, the performance of their duties would absolutely and totally preclude the performance of the duties of a consulate. Undoubtedly a State may impose these duties upon any and all of its citizens ; but if it consents that one of them may hold a foreign consulate, it parts with this right, so far as that citizen is concerned, until it revokes the *exequatur* which it has granted. Its right to refuse the *exequatur*, in the first instance, or to revoke it at any time afterward, is universally conceded.¹

§ 12. The federal legislation, on the subject of foreign consuls in the United States, so far as it has gone, accords with the general spirit of international jurisprudence, as announced by the doctrines of the best writers. Section 9 of article I of the Constitution disqualifies a person from holding, at the same time, without the consent of Congress, an office under the federal government, and under any foreign prince or State. And section 2 of article 3 accords to every foreign consul the privilege of being sued in the federal courts ; and section 9 of the judiciary Act of 1789 gave to the federal courts *exclusive* jurisdiction of all suits against consuls and vice-consuls, with certain exceptions, enumerated in the act. It has been decided that these privileges comprehend foreign consuls, who are also citizens, and, also, that where a foreign consul is sued jointly with others, it brings his co-defendants within the jurisdiction of the federal courts, by unavoidable implication. The object of this exclusion of the State courts, says the New York court of appeals, is not to exempt a consul from liability to respond to his creditors, or to answer for his misconduct, but to keep within the control of the federal government, and subject to the authority of its courts, all cases and controversies which might in any degree affect our foreign relations. Mr. Cushing argues that, inasmuch as citizens holding foreign consulates are not specially exempted by the

Jurisdiction over consuls in United States

¹ Horne, *On Diplomacy*, sec. i. § 13 ; Martens, *Guide Diplomatique*, tome i. § 74 ; Garden, *De la Diplomatie*, tome i. p. 323 ; De Clercq, *Guide Pratique*, liv. i. ch. i. § 4 ; Cushing, *Opinions of U. S. Attys.-Genl.*, vol. viii. p. 169 ; Mensch, *Guide du Consulat*, pt. i. ch. iv.

constitution, or any act of congress, from service in the militia or on juries, they must be considered liable to such services, unless so exempted by the statutes of the States of the union in which they respectively reside. But this conclusion is too broad; the same course of reasoning would prove the liability of public ministers, and of officers of the federal government, to the same service. He admits, however, that so far as consuls are exempted by the law of nations, or by the rules of international comity, the subject is withdrawn from the domain of municipal jurisprudence. The convention between the United States and France, of February 23, 1853, placed the consuls of the respective countries, so far as this question is concerned, upon a footing conformable to the spirit of international jurisprudence. It stipulated that the consuls of the respective countries should enjoy 'exemption from military billetings, from service in the militia or the national guard, and other duties of the same nature, and from all direct and personal taxation, whether federal, State, or municipal.' But if they are citizens of the country where they reside, or become owners of property, or engage in trade there, they are then to be subject to the same taxes and imposts, and, save in matters appertaining to their consular functions, to the same jurisdiction as citizens of the country who are proprietors or merchants.¹

Powers of
arbitra-
tion

§ 13. The duties of consuls are regulated, in a great measure, by the laws of their own country, subject, of course, to the general principles of international jurisprudence.² Thus, although they can exercise no contentious jurisdiction over their fellow countrymen without the express permission of the State in which they reside, they are, nevertheless, allowed a sort of voluntary jurisdiction—a power of arbitration

¹ Cushing, *Opinions of U.S. Attys.-Genl.*, vol. vi. p. 409; vol. viii. p. 169; Davis *v.* Packard, 7 *Peter R.*, 276; Valarino *v.* Thompson, 3 *Selden R.*, 577; Mannhardt *v.* Soderstrom, 1 *Binney R.*, 138.

² The English legislature almost entirely ignores the jurisdiction of any foreign consul in the United Kingdom. It is certain that he administers oaths and receives affidavits in Great Britain for the purpose of taking evidence for his own tribunals and for matters continuing in this country—i.e. in receiving a ship's protest, or in swearing a surveyor to inspect a ship in England. It is probable that such oaths and affidavits are void in England. The German and Swiss Governments very properly forbid their consuls to administer oaths in foreign countries. By 41 Geo. III., c. 79, no one in England may exercise the office of a notary unless duly admitted as such; *semble* that the notarial acts of foreign consuls in England are illegal.

in certain kinds of disputes, more especially those relating to matters of commerce, which though not binding upon the tribunals of the place, are so upon those of his own country. But these special powers of a consul belong rather to the municipal laws of his own State than to international jurisprudence.¹

§ 14. As consuls, in Christian countries, do not enjoy the privileges of extra-territoriality, and have no jurisdiction over their own countrymen (unless conceded by treaty), which is recognised by international law, it follows that all exercise of such jurisdiction, even by consent of parties, produces no effect in foreign tribunals, whatever it may have in those of their own State. Thus, marriages and divorces by consuls, although valid in municipal law, are not so in international law, nor, as a general rule, even in their own countries, for, as the consul has no extra-territoriality, and is not an

**Marriages
and
divorces
by consuls**

¹ The principal duties of the British Consul are those enjoined by the Consular Act, 6 Geo. IV., c. 87; by the Acts relating to the Slave Trade, 5 Geo. IV., c. 113, 6 and 7 Vict., c. 98; by the Acts relating to the Mercantile Marine, viz. 17 and 18 Vict., c. 104, 18 and 19 Vict., c. 91, 25 and 26 Vict., c. 63, 30 and 31 Vict., c. 124. Some sections of the Consular Act have been repealed or have been altered by order in Council. Section 18 of this Act allows Consuls to relieve shipwrecked and distressed British subjects, but their powers in this respect are limited to what they may be authorised to do under instructions from the British Government. A special distinction is made between persons who come under the classes of seafaring or non-seafaring British subjects. Section 20 of the same empowers Consuls-General and Consuls to administer oaths and to act as notaries, and the Act 18 and 19 Vict., cap. 42, extends this power to Consular Officers of other ranks. See also 15 and 16 Vict., c. 86, § 22. Whatever measures of quarantine may be adopted within the district of any British Consular Officer should immediately be made known by him to the Secretary of State, and to any British Naval, Military, or Colonial authority who may be within reach, and he should equally report the appearance of any fever or disease having a contagious or infectious character, and whether affecting human or animal life. Whenever British Consular Officers have reason to believe that there are any next of kin, in England or elsewhere, to deceased British subjects dying abroad, they should communicate in the first instance with those persons. See also the Consular Salaries and Fees Act, 1891.

Great Britain has hitherto refrained from entering into conventions with civilised foreign States defining the powers of her Consuls in such States. She has, however, entered into a Declaration with Denmark (1877), with Italy (1877), and with Russia (1880) with regard to the disposal of the estates of deceased seamen who shall die on board ship; she has also agreed with France, Germany, and Sweden and Norway on the same subject. She has entered into Agreements with France (1879), with Germany (1879), and with Italy (1880) for mutual arrangements for the reciprocal relief of distressed seamen. She has also entered into Agreements (see p. 268) concerning deserters from merchant ships. All of which matters come under the jurisdiction of Consuls.

officer of the local government, the marriage contract, or its dissolution, is not made by the *lex loci*, either of the country where the parties are, or of that to which they belong.¹ It has, therefore, been held by the Attorney-General of the United States, that an American consul in a Christian country has no power to celebrate marriages between either foreigners or Americans. As will be shown hereafter, a different rule applies to consuls in the East. In proceedings in admiralty, when the courts are adjudicating cases of prize, or other questions of maritime and international right, consuls are permitted to appear in behalf of the interests of their countrymen ; so, also, in cases of the administration of estates of their countrymen, or in which their countrymen are interested ; but in all such cases they intervene by way of advice, or in the sense of *surveillance*, but not by way of jurisdiction.²

¹ By the Foreign Marriage Act, 1892 (55 and 56 Vict., c. 23), a Secretary of State may authorise any British Ambassador, Governor, High Commissioner, Consul-General, Vice-Consul, or Consular Agent to solemnise marriages in foreign countries between persons both or one of whom are British subjects, subject to Orders in Council regulating the procedure, and provided that no such officer shall be required to permit such marriage if in his opinion the solemnisation thereof would be inconsistent with international law. Marriages of British subjects domiciled in foreign countries, which are solemnised according to the *lex loci*, are not affected by these Acts. But it being the law of Great Britain and Ireland that marriage with a deceased wife's sister is void, such a marriage would derive no validity from the circumstance of its being solemnised in a foreign country under the Acts, although the law of such country may not prohibit such marriages. A marriage which would not be valid if solemnised in England is equally invalid if solemnised at a British Mission or Consulate, notwithstanding the *lex loci* prevailing generally with regard to marriage, in the country where the Minister or Consul resides. Particular attention should be given to registration, in order that due record may be kept at the office of the British Registrar-General, of all marriages performed under these Acts. These Acts do not provide for the registration of births and deaths of British subjects in foreign countries, but it is nevertheless very important that such registers should be kept at each Consulate, and should be transmitted to the Registrar-General (and see *Brit. O. F. Inst.*).

Marriages celebrated in the presence of any Consular Officer of the United States in a foreign country, between persons who would be authorised to marry if residing in the district of Columbia, are valid to all intents and purposes as if the said marriage had been solemnised in the United States. This does not authorise the Consul to perform the ceremony. The Consul is forbidden to perform such ceremony, unless he performs it within the precincts of a legation of the United States, or of a Consulate which has by treaty or custom the privilege of extraterritoriality ; or unless he is expressly authorised to do so by the laws of the country in which he resides.

² De Clercq, *Guide des Consulats*, p. 686 ; Miltitz, *Des Consulats*, pt. ii. pp. 408, 414, 425 ; Santos, *Traité du Consulat*, tome i. p. 21 ;

§ 15. Consuls are usually allowed to grant passports to ^{The} subjects of their own country living within the range of their ^{granting} consulates, but not to foreigners. They, however, are usually ^{of} ~~passports~~ required to put their *visé* upon the passports of foreigners who embark from the place of their consulate, to go to their (the consuls') country. But this, again, is a matter of local law of their own State. Passports, to be valid, should be given by the proper minister of the country of the person using them, or, at least, by the minister of that country at the court of the State in which they are to be used ; usage has, nevertheless, extended the same effect to passports issued by consuls, within their consular jurisdiction.¹

§ 16. Consuls are frequently required to give certificates ^{Certifi-} relating to matters of fact connected with the commerce of ^{ates} their fellow-countrymen, and of merchant vessels of their own State. Such certificates, under seal, receive full faith and credit in the courts of the country where such fact is collaterally called in question. The laws of most States make it the duty of their consuls to take acknowledgment of deeds for the conveyance of real estate, the depositions of witnesses in civil causes, &c. ; but the legal effect to be given to such acts must, in general, be determined by municipal law.²

tome ii. p. 52 ; Cushing, *Opinions of U. S. Attys.-Genl.*, vol. vii. p. 18 ; vol. viii. p. 98 ; Kent *v.* Burgess, 11 *Simons R.*, 361.

¹ British Consular Officers will rarely be called upon by British subjects for passports ; inasmuch as if local regulation should require foreigners on entering the local territory to be provided with passports, those documents should antecedently be procured by travellers ; but if at any time British subjects should prove to a Consular Officer that a passport or other document from him is requisite to enable them to travel in or to pass out of the locality, he may consider himself authorised to grant such document or passport. Whenever local regulations require that foreigners passing through a place, where a Consular Officer of their nationality is stationed, should have their passports *visés* by such Officer he may affix such *visa* ; but before doing so he should satisfy himself, so far as possible, that there is no objection to such proceeding, and that the applicant is really a British subject ; for in no case is a British Consular Officer allowed to *viser* the passport of a person not a British subject, or not holding British employment. This remark equally applies to the grant of a passport. (*Brit. F. O. Inst.* ; Martens, *Guide Diplomatique*, § 78 ; Fynn, *British Consul's Handbook*, pp. 36, 55 ; Mensch, *Guide du Consulat*, pt. i. ch. ix.)

² British Consular Officers are instructed to be careful not to grant a certificate of any fact of which they have not accurately ascertained the truth. It is their duty to take especial care that they are not entrapped into affording assistance to the commission of fraud upon her Majesty's revenue, or into giving the weight of their authority to slander, and thus do an injury to an innocent person by damaging his character. But

They can
afford no
refuge
from
process

§ 17. Although within the general duties and rights of consuls to watch over the interests of their own countrymen, it must be remembered that they can afford no protection against due process of the laws of the country where they reside, and any attempt to evade or resist their execution would constitute an offence for which the offending consul may be dismissed or punished. The only protection he can afford, even to his own countrymen,¹ in such cases, is to see that the laws are properly administered ; and if injustice is done to his fellow-countrymen by depriving them of the ordinary right of trial, or by distinguishing unfavourably between them and citizens of the State where he resides, and to which the tribunals belong, he should make representation to his own government, to whom it belongs to require explanation and satisfaction. He has no diplomatic authority to demand either the one or the other. Nevertheless, by a judicious but firm proceeding, and the exertion of his personal and official influence with the local authorities, he may do much toward securing the just rights of his countrymen, or in mitigating the severity of their punishment for the offences committed.²

Engaging
in trade

§ 18. Some States permit, and others forbid, their consuls to trade. As already stated, a consul engaged in trade is, in all that concerns that trade, subject to the local laws, and to the local jurisdiction, in the same way as a native merchant. Their consular character gives them no privileges in trade, either in peace or war. 'The character of consul,' says Lord

Consular Officers are not to decline to swear parties to affidavits, in proceedings pending in a British court of justice, by insisting on making themselves acquainted with the matter pending in such court. (*Brit. F.O. Inst.* ; see also Heffter, *Droit International*, § 247.)

¹ Naturalised British subjects who can prove to Consular Officers that they are entitled to British Consular protection abroad are to be treated in every respect as British-born subjects ; but certificates, if granted subsequently to the year 1850, do not entitle the holders to any privileges out of her Majesty's dominions, unless they are provided with a passport from the British Secretary of State for Foreign Affairs, or from the Governor of any British colony in which they may have been naturalised, giving them for the term therein specified power to travel abroad. Naturalised British subjects cannot claim in the country of their birth any privileges as such, unless by the laws of the country of their birth they have been denationalised.

² Phillimore, *On Int. Law*, vol. ii. § 258 ; Horne, *On Diplomacy*, sec. i. § 13 ; Bello, *Derecho Internacional*, pt. i. cap. vii. § 2 ; Moreuil, *Manuel des Agents Con.*, pt. iii. tit. ii. ; Riquelme, *Derecho Púb. Int.*, lib. ii. cap. Ad., 3.

Stowell, 'does not protect that of a merchant, united in the same person.' It is certainly a very objectionable practice to permit consuls to engage in trade, and has so been regarded by the best writers on international law. It necessarily brings them in competition, and not unfrequently in conflict, with the merchants of the place where they reside, and consequently weakens or destroys their official influence.¹

§ 19. The public character of consul has frequently been the subject of judicial decision in the prize courts and municipal tribunals of France, Great Britain, and the United States. The cases of the Marquis de la Fuente Hermosa, decided by the Cour Royale de Paris, in 1842, and that of M. Soller, decided by the Cour Royale d'Aix, in 1843, are leading cases in France; those of Barbuit and Cretico, in England. The courts of the United States have generally followed the English decisions on this subject.²

Public
character
of consul

§ 20. Rights, privileges, and immunities are sometimes conceded to consuls by treaty stipulations, which they are not

Treaty
stipulations

¹ It was decided in a Circuit Court of the United States that where a foreign Consul is carrying on trade as a merchant in the enemy's country, his Consular residence and character will not protect that trade from interruption by the seizure and condemnation of his property as enemy's property; and notwithstanding his Consular character he is to be considered in all commercial transactions as on the same footing as any other resident merchant. (The 'Pioneer,' Blatchf., *Pr. Cas.*, 666.)

² Barbuit's Case, *Talbot's Cases in Equity*, p. 281; Clarke v. Cretico, 4 Burr. R., 1481; Viveash v. Becker, 3 M. and Sel. R., 297; the 'Indian Chief,' 3 Rob., 26; Arnold v. U. Ins. Co., 1 John. R., 363; Griswald v. Waddington, 16 John. R., 346. In the case of the 'Nina' (2 L.R.P.C., 38), the Privy Council was of opinion that the protest of a foreign Consul does not *ipso facto* operate as a bar to the prosecution of a suit for wages. The 'Golubchick' (1 W. Rob., 148) decides that the jurisdiction of the court of Admiralty cannot depend upon the will of a foreign Consul; that as he cannot confer the jurisdiction so he cannot take it away. If the Consul protests, but advances no reason, the suit will proceed. If he advances reasons for staying the suit, the plaintiff must be at liberty to dispute the facts and answer the reasons put forward by the Consul; and then the Judge of the Court of Admiralty is to exercise his discretion and determine whether, having regard to those reasons with the answers thereto, it is fit and proper that the suit should proceed or be stayed. By discretion is meant, according to White v. Damon (1 Ves., 35), not an arbitrary, capricious discretion, but one that is regulated upon grounds that will make it judicial. That the exercise of this jurisdiction by the Court of Admiralty lies in the discretion of the court in the sense before stated, is established by a long line of authorities, from the time of Lord Stowell down to the present. They are all one way and conclusive on this subject. Their Lordships followed the decision in the case of the 'Octavie' (*Brown and Lush*, 215), and held that this discretion is not taken away by the 10th section of the Admiralty Jurisdiction Act, 1861.

entitled to by the general law of nations. Thus, by the convention between France and the United States, in 1853, certain rights of jurisdiction and exemption, not accorded by international law, were given to the consuls of the contracting powers. But such treaty stipulations are binding only upon those who are parties to the agreement. The same may be said of municipal laws, which give special privileges to foreign consuls; they have no effect beyond the limits of the State which passes them, unless specially adopted or permitted by others.

Consuls of
Christian
States in
the East

§ 21. As already remarked, the powers, privileges, and immunities of European and American consuls, in Mohammedan and unchristian dominions, are very different from those of consuls in Christian countries. This has resulted, in part, from their having there retained the general diplomatic character and prerogatives of jurisdiction, which, in earlier times, they possessed everywhere, and, in part, from the stipulation of treaties. Such jurisdiction, both civil and criminal, being conceded by the above States to consuls over their countrymen, to the exclusion of the local magistrates and tribunals, it depends upon the laws of the State of the consul how it shall be exercised, and what penalties or punishments may be imposed or inflicted. In civil cases this jurisdiction is ordinarily subject to an appeal to the superior tribunals of their own country, and in criminal cases the prisoners are sometimes sent home for trial and punishment.¹

Opinion
of Mr.
Attorney-
General
Cushing

§ 22. Mr. Cushing, the United States Attorney-General, thus describes the origin of this difference of consular powers in Christian and unchristian countries: 'I might demonstrate historically what, in this place, it will suffice to affirm, that the institution of consuls, in their present capacity of international agents, originated in the mere fact of difference in law and religion at that period of modern Europe in which it was customary for distinct nationalities, coexisting under the same general political head, and even in the same city, to maintain such a distinct municipal government. Such municipal colonies, organised by Latin Christians, and especially by those of the Italian Republics in the Levant, were administered each by its *consuls*, that is, its proper municipal

¹ Wheaton, *Elem. Int. Law*, pt. ii. ch. ii. § 11; Phillimore, *On Int. Law*, vol. ii. §§ 272 et seq.; Dalloz, *Répertoire*, verb. 'Consuls,' § 1.

magistrates of the well-known municipal denomination. Their commercial relation to the business of their countrymen was a mere incident of their general municipal authority. Such, also, at the outset, was the nature of their political relation to other co-existing nationalities around them in the same country, and to that country's own supreme political or military powers. The consuls of Christian States, in the countries not Christian, still retain unimpaired, and habitually exercise, their primitive function of municipal magistrates for their countrymen, their commercial or international capacity, in those countries, being but a part of their general capacity as the delegated administrative and judicial agents of their nation. This condition of things came to be permanent in the Levant, that is, in Greek Europe and its dependencies, by reason of the tide of Arabic and Tartar conquest having overwhelmed so large a part of the Eastern empire, and established a Mohammedan religion there. But the result was different in Latin Europe.' This difference, in the powers of consuls in Christian and Mohammedan countries, he says, is founded on the difference of law which necessarily results from the character of the different religions. 'The legislature of Mohammed, for instance, like that of Moses, is inseparable from his religion. We cannot submit to one without undergoing the other. The same legal incompatibility exists, for one reason or another, between us and the unchristian States not Mohammedan.'

¹

§ 23. The general powers of the consuls of Christian nations in Turkey, the Barbary States, and other Mohammedan countries, have been extended, by treaty stipulations, to some European, and to American consuls, in the Chinese empire, in Japan, in Persia, in Madagascar, in Muscat, in Zanzibar, and elsewhere. In Egypt the establishment of international Courts has given an extraordinary jurisdiction to representatives of European States in that country, vastly superior to the ordinary consular jurisdiction. It was the object of the above-mentioned treaties to exempt foreigners from the civil and criminal jurisdiction of the local magistrates and tribunals, and make them subject only to the laws and authorities of their own country, thus creating a kind of extra-territoriality for all citizens of the contracting States

Powers of
European
consuls in
China,
Japan,
and other
Oriental
countries

¹ Cushing, *Opinions U. S. Attys.-Genl.*, vol. vii. pp. 346-348.

resident in or visiting any part of the East where the treaties obtained.¹

¹ See the Treaties between Great Britain and China, 1842, 1843, and 1858 concerning Free Trade ; and the Convention of Peking, 1860 ; Treaty between United States and China, 1844 and 1858 ; Treaty between France and China, 1844 ; Treaty between Prussia and China, 1863 ; Treaty between Russia and China, 1860 ; Treaty of 1857 between Great Britain and Persia ; of 1856 between the United States and Persia. The thirteenth Article of the commercial treaty between Great Britain and China, in 1843, is as follows :— ‘ Whenever a British subject has reason to complain of a Chinese, he must first proceed to the Consulate and state his grievance. The Consul will thereupon enquire into the merits of the case, and do his utmost to arrange it amicably. In like manner, if a Chinese have reason to complain of a British subject, he shall no less listen to his complaint, and endeavour to settle it in a friendly manner. If an English merchant have occasion to address the Chinese authorities, he shall send the address through the Consul, who will see that the language is becoming ; and, if otherwise, will direct it to be changed, or will refuse to convey the address. If, unfortunately, any disputes take place of such a nature that the Consul cannot arrange them amicably, then he shall request the assistance of a Chinese officer, that they may, together, examine into the merits of the case, and decide it equitably. Regarding the punishment of English criminals, the English Government will enact the laws necessary to attain that end, and the Consul will be empowered to put them in force ; and, regarding the punishment of Chinese criminals, these will be tried and punished by their own laws, in the way provided for by the correspondence which took place at Nankin after the conclusion of peace.’

The Articles of the Treaty of 1844, between France and China, are as follows :—‘ XXV. Lorsqu’un citoyen français aura quelque sujet de plainte ou quelque réclamation à formuler contre un Chinois, il devra d’abord exposer ses griefs au consul, qui, après avoir examiné l’affaire, s’efforcera de l’arranger amiablement. De même, quand un Chinois aura à se plaindre d’un Français, le consul écoutera sa réclamation avec intérêt, et cherchera à ménager un arrangement amiable. Mais si, dans l’un ou l’autre cas, la chose était impossible, le consul requerra l’assistance du fonctionnaire chinois compétent, et tous deux, après avoir examiné conjointement l’affaire, statueront suivant l’équité. XXVI. Si dorénavant des citoyens français, dans un des cinq ports, éprouvaient quelque dommage, ou s’ils étaient l’objet de quelque insulte ou vexation de la part de sujets chinois, ceux-ci seront poursuivis par l’autorité locale, qui prendra les mesures nécessaires pour la défense et la protection des Français. A bien plus forte raison, si des malfaiteurs, ou quelque partie égarée de la population, tentaient de piller, de détruire ou d’incendier les maisons, les magasins des Français, ou tout autre établissement formé par eux, la même autorité, soit à la réquisition du Consul, soit de son propre mouvement, enverrait en toute hâte la force armée pour dissiper l’émeute, s’emparer des coupables et les livrer à toute la sévérité des lois ; le tout sans préjudice des poursuites à exercer par qui de droit pour indemnisation des pertes éprouvées. XXVII. Si malheureusement il s’élevait quelque rixe ou quelque querelle entre des Français et des Chinois, comme aussi dans le cas où, durant le cours d’une semblable querelle, un ou plusieurs individus seraient tués ou blessés, soit par des coups de fer, soit autrement, les Chinois seront arrêtés par l’autorité Chinoise, qui se chargera de les faire examiner et punir, s’il y a lieu, conformément aux lois du pays. Quant aux Français, ils seront arrêtés à la diligence du consul, et celui-ci prendra toutes les mesures nécessaires pour que les prévenus soient livrés à l’action régulière des lois françaises, dans la

§ 24. With respect to the jurisdiction and judicial powers exercised by British consuls and other officers in the East, the Foreign Jurisdiction Act (53 & 54 Vict., c. 37) is very general in terms.¹ The details are supplied by Orders in Council and by instructions from the Foreign Office. Among these are the 'China and Japan Order in Council, 1881,' making regulations for the British Courts in the dominions of the Emperor of China and of the Mikado of Japan, and appointing judges, and dealing with prisons, mortgages, bills of sale, &c.; also the 'China, Japan, and Corea Order in Council, 1884;' also the 'Ottoman Order in Council of 1882,' bestowing similar powers to that in the 'Order of China and Japan' in the Turkish dominions; also the 'Siam Order in Council, 1884,' and the 'Zanzibar Order in Council, 1884.' Although the Porte has given to the Christian Powers of Europe authority to administer justice to their own subjects according to their own laws, it neither has professed to give, nor could give, to one such Power any jurisdiction over the subjects of another Power. But it has left these Powers at liberty to deal with each other as they may think fit, and if the subjects of one country desire to resort to the tribunals of another, there can be no objection to their doing so with the consent of their own sovereign, and that of the sovereign to whose tribunals they resort. There is no compulsory power in an English Court in Turkey over any but English subjects; but a Russian or any other foreigner may, if he pleases, voluntarily resort to it with the consent of his sovereign, and thereby submit himself to its jurisdiction.²

forme et suivant les dispositions qui seront ultérieurement déterminées par le gouvernement Français. Il en sera de même en toute circonstance analogue et non prévue dans la présente convention, le principe étant que, pour la répression des crimes et délits commis par eux dans les cinq ports, les Français seront constamment régis par la loi française. XXVIII. Les Français qui se trouveront dans les cinq ports dépendent également, pour toutes les difficultés ou les contestations qui pourraient s'élever entre eux, de la juridiction française. En cas de différends survenus entre Français et étrangers, il est bien stipulé que l'autorité chinoise n'aura à s'en mêler d'aucune manière. Elle n'aura pareillement à exercer aucune action sur les navires marchands français; ceux-ci ne relèveront que de l'autorité française et du capitaine.'

¹ See *Hervey v. Fitzpatrick, Kay R.*, 421, on the construction of the Foreign Jurisdiction Act, 1843 (6 and 7 Vict., c. 94), repealed.

² 'The *Laconia*,' 2 *Moore, P.C. (N.S.)*, 183; 'The *Indian Chief*,' 3 *Rob.*, 28. By the Treaty of London of March 10, 1883, Great Britain, Ger-

Japan

§ 25. Japan formerly traded only with China and Holland, but in 1854 she entered into a commercial treaty with Great Britain. In the same year a treaty was entered into between Japan and the United States, by which it was stipulated that the United States should appoint consuls or agents to reside in Simoda, at any time after the expiration of the eighteen months from the date of the signing of the treaty, if either of the two governments deemed such arrangement necessary. By a subsequent treaty in 1857, between the two countries, it was provided that Americans committing offences in Japan should be tried by the American Consul-General or Consul, and should be punished according to American laws. Japanese committing offences against Americans were to be tried by the Japanese authorities, and punished according to Japanese laws. By a subsequent treaty in 1858, between the two countries, after again declaring the above, it was further agreed that the Consular Courts should be opened to Japanese creditors, to enable them to recover their just claims against American citizens, and that the Japanese Courts should in like manner be open to American citizens for the recovery of their just claims against the Japanese. By the treaty of Jeddo, 1858, Japan was opened to the commerce of Great Britain. Yedo, Osaka, and Hiogo were opened to European commerce in 1868.

Treaties between Japan and Great Britain, and between Japan and France, were ratified in 1865. In that year, by the authority of the 7 and 8 Vict., cc. 80 and 94 (now repealed), of the British Treaties with China and Japan, an Order in Council was issued, establishing a Supreme Court of Justice at Shanghai, and Provincial Courts in China and in Japan, and directing that all British jurisdiction exercisable in China or in Japan for the judicial hearing and determination of matters in difference between British subjects, or between foreigners (including Chinese and Japanese) and British subjects, or for the administration or control of the property or

many, Austria, France, Italy, Russia, and Turkey, for the execution of Articles 54 and 55 of the Treaty of Berlin, 1878, agreed to extend the jurisdiction of the European Commission of the Danube for twenty-one years from April 24, 1883, and adopted the regulations of June 2, 1882, for navigation, river police, and superintendence. These regulations are enforced by the officers of the Mixed Commission of the Danube, and are binding (*inter alia*) upon all British subjects.

persons of British subjects, or for the repression or punishment of offences committed by British subjects, or for the maintenance of order among British subjects, should thenceforth be exercised under and according to that Order.

§ 26. De Clercq, writing in 1851, says that no special French laws or regulations had yet been made for carrying into effect their treaty of 1844, and that the jurisdiction of the French agents in China, having no other legal basis than the *ordonnance* of 1681, was, consequently, bound to conform to the dispositions of that *ordonnance*. But now the jurisdiction of French consuls in China has been made conformable to the dispositions of this treaty. Appeals, in certain specified cases, are allowed from the French consular tribunals in China to the French court of appeals in Pondicherry. The jurisdiction and proceedings of the French consular courts in the East are regulated with great minuteness of detail.¹

§ 27. Mr. Cushing, the American commissioner who negotiated the treaty of July 3, 1844, between the United States and China,² in his letter to the American Secretary of State, dated September 29, 1844, says that he entered China with the general conviction that the United States ought not to concede to any Mohammedan or pagan State, under any circumstances, the local jurisdiction over a citizen of the United States, which was claimed and exercised by foreign *Christian* States. 'In our treaties with the Barbary States, with Turkey, and with Muscat, I had the precedent of the assertion, on our part, of more or less of exclusion of the local jurisdiction, in conformity with the usage, as it is expressed in one of them, observed in regard to the subjects of other Christian States. In China I found that Great Britain had stipulated for the absolute exemption of her subjects from the jurisdiction of the empire, while the Portuguese attained the same object through their own local jurisdiction at Macao. I deemed it, therefore, my duty, for all the reasons assigned, to assert a similar exemption on behalf of the citizens of the United States. This exemption is agreed to in terms by the letter of the treaty of Wang Hiya. And it was fully admitted by the Chinese, in the

¹ De Clercq, *Guide des Consulats*, pp. 150-153; De Clercq, *Formulaire des Chancelleries*, tome ii. pp. 369-374; *Ordonnance d'août*, 1681, liv. i. tit. ix. arts. 13-15; Moreuil, *Manuel des Agents Cons.*, pp. 379 et seq.

² The Treaties of June 18 and November 8, 1858, take its place.

correspondence which occurred contemporaneously with the negotiation of the treaty, on occasion of the death of Sha Aman. . . . By that treaty, thus construed, the laws of the United States follow its citizens, and its banner protects them, even within the domain of the Chinese empire. The treaties of the United States with the Barbary powers, and with Muscat, confer judicial functions on our consuls in those countries ; and the treaty with Turkey places the same authority in the hands of our minister or consul, as the substitute for the local jurisdiction, which, in the case of a controversy, would control it, if it arose in Europe or America. These treaties are, in this respect, accordant with general usage, and what I conceive to be the principles of the law of nations in relation to the non-Christian powers. In extending these principles to our intercourse with China, seeing that I have obtained the concession of absolute and qualified extra-territoriality, I consider it well to use in the treaty terms of such generality, in describing the substitute jurisdiction, as, while they held unimpaired the customary or law of nations jurisdiction, do also leave to congress the full and complete direction to define, if it please to do so, what officers, with what powers, and in what form of law, shall be the instruments for the protection and regulation of the citizens of the United States.' Mr. Cushing, in commenting upon this treaty, shows that it confers on citizens of the United States, in China, absolute and unqualified extra-territoriality in all *criminal* matters, and provides, with respect to *civil* matters : 1st. That questions arising *between citizens of the United States*, in China, shall be subject to the jurisdiction, and be regulated by the *authorities* of their own government ; 2nd. That, in controversies between a citizen of the United States and a Chinese, the authorities of the two governments are to have concerted action ; 3rd. That, in controversies between a citizen of the United States and any other person, not a Chinese, the adjustment is to be regulated by the international relations of the United States and the government or State of that other person.¹

§ 28. The statute of 1848 regulating the consular jurisdiction of the United States under the above treaty was

¹ Cushing, *Opinions U. S. Attys.-Genl.*, vol. vii. pp. 498, 501 ; Forbes v. Scannel, 13 Cal. R., 242.

amended by new statutes passed in 1860 and 1870, which apply to all other Eastern countries, with which similar treaties may be made by the United States, and confer certain judicial powers on consuls and other functionaries of the United States in those countries. The Consular Regulations of the United States (edition of 1888) treat (*inter alia*) of the judicial powers of consuls in Oriental, non-Christian, and uncivilised countries.¹

**Acts of
Congress
of United
States for
carrying
treaties
into effect**

¹ By the *Regulations Prescribed for the Consular Service of the United States*, 1888, it appears that treaties and conventions have been entered into by the United States with Austria-Hungary, the Argentine Confederation, Belgium, Borneo, Bolivia, China, Colombia, Corea, Costa Rica, Denmark, the Dominican Republic, Ecuador, Egypt, France, Germany, Greece, Guatemala, the Hanseatic Confederation, Honduras, Hawaii, Hayti, Italy, Japan, Liberia, Madagascar, Mexico, Morocco, Muscat, Netherlands, Nicaragua, New Granada, Orange Free State, Paraguay, Persia, Portugal, Russia, Roumania, Salvador, Samoa, Servia, Siam, Spain, Sweden and Norway, Switzerland, Tripoli, Tunis, and Turkey, by which certain privileges and powers are granted to consular officers of the United States. These privileges and powers are not the same with respect to all the above-mentioned nations; the reader is referred to the special treaty stipulations in each case. Generally it may be observed that some nations have granted to the United States inviolability of the archives and papers of the consulate (Reg. 57); others the inviolability of the consular office and dwelling (Reg. 58); others exemption of consular officers from arrest (Reg. 59); others exemption of Consuls from liability to appear as witnesses (Reg. 60); others exemption of Consuls from taxation (Reg. 61); others exemption of Consuls from military service (Reg. 62); others the right to exhibit the national arms or flags on consular offices (Reg. 64); others the right to take depositions (Reg. 65); others the right to reclaim deserters from vessels of the United States (Reg. 67); others entitle such Consuls to the custody of the property of citizens of the United States dying within the limits of the Consulate (Reg. 69).

By Reg. 66 consular officers of the United States have exclusive jurisdiction over disputes between masters, officers, and crew of their vessels, including questions of wages, in Austria-Hungary, Belgium, Colombia, Denmark, Dominican Republic, France, Germany, Greece, Italy, the Netherlands, Portugal, Russia, Roumania, Salvador, Sweden and Norway, and Tripoli; and by Reg. 71 Consuls have exclusive jurisdiction over crimes and offences committed by citizens of the United States in Borneo, China, Corea, Japan, Madagascar, and Siam. In Morocco, Tripoli, and Tunis the Consuls are empowered to assist in the trial of citizens of the United States accused of murder or assault. In Persia citizens of the United States committing offences are to be tried and judged in the same manner as are the subjects or citizens of 'the most favoured nation.' Americans committing offences in Turkey should be tried by their Minister or Consul, and are to be punished according to their offence, following, in this respect, the usage observed towards other Franks; but, in consequence of a disagreement as to the true text of the treaty, Consuls in the Ottoman dominions are instructed to take the directions of the Minister of the United States at Constantinople, in all cases, before assuming to exercise jurisdiction over criminal offences. In China and Japan the question of the judicial authority of Consuls of the United States over persons, serving

Contro-
versies
between
subjects
of foreign
States in
Oriental
countries

§ 29. It will be observed that, in the case of treaty stipulations, where controversies arise, in the East, between citizens (say) of the United States and subjects of Great Britain or France, the indigenous laws do not apply, nor can the local tribunals give any relief. The jurisdiction of such controversies is left to be determined by treaties between the respective foreign governments. But if no such special treaties have been made, are there no means left for the determination of such controversies? Is the system of law and jurisdiction established by treaty so imperfect and defective, that Asiatic, European, and non-resident Americans in China have no means of determining their controversies with Americans resident there; and can American residents have no judicial relief against other resident or domiciled foreigners? There is no plainer or better established principle of public law than this, that alien friends may sue in the courts of the *defendant's* country. Now, in China, as in other unchristian countries, American citizens and American consular courts enjoy the rights of extra-territoriality, and the same may be said of

on American vessels, has been construed as authorising consular officers to assume jurisdiction where offences are committed on shore by foreigners, serving on board American merchant vessels, when such foreigners are citizens or subjects of countries having no treaty engagements upon the subject with China and Japan, or when, being subjects or citizens of treaty Powers, their own Consuls decline to assume jurisdiction. Under other circumstances a Consul of the United States in China cannot entertain a criminal charge against a citizen or subject of another Power. Seamen serving on board public vessels of the United States, who have committed offences on shore in Japan and China, are held to be subject to the jurisdiction of the Consul of the country under whose flag they are serving.

By Reg. 74 jurisdiction over civil disputes is conferred by Borneo, China, Corea, Japan, Madagascar, Morocco, Muscat, Persia, the Porte, Samoa, Siam, Tripoli, and Tunis. This jurisdiction is exclusive in disputes between citizens of the United States. In Persia suits and disputes between Persian subjects and American citizens are to be heard before the Persian tribunals where the Consul is located, and in the presence of an employé of the Consul. In Japan it extends to claims of Japanese against Americans. In China, Siam, and Samoa the jurisdiction is joint in controversies between Americans and Chinese, Siamese, or Samoans. In Madagascar the exclusive jurisdiction extends to disputes between citizens of the United States and subjects of Madagascar. In Turkey there can be no hearing in a dispute between Turks and Americans, unless the dragoman of the consulate is present.

The above regulations claim that if Consuls are citizens of the United States, and do not hold real estate or engage in business in the country to which they are sent, they will be exempt from the performance of such personal duties towards the local Government as may interfere with the performance of their consular duties.

British and French citizens, and British and French consular courts. Each one is, in the eyes of the law, to be considered within the territory of his own State. It follows, therefore, that an American in China may resort to the British courts there against an Englishman, or to the French courts there against a Frenchman, precisely as he might in England or France, and that an Englishman or a Frenchman may resort to American courts in China against an American, precisely as he might in the United States. The maxim of the Roman law, *actor sequitur forum rei*, is an admitted principle of the jurisprudence of all civilised nations.

§ 30. In 1875 an International Court was established in Egypt, under the following circumstances: viz., there were then sixteen or seventeen consulates, having jurisdiction over the subjects of the nations they represented; there were also the native tribunals. Consequently, in this state of things, the universal rule followed with regard to civil and commercial matters, was that the defendant was brought before his own tribunal; that is to say, the native before the local tribunal, and the foreigner before the tribunal of his consulate. It was the absolute application of the rule *actor sequitur forum rei*. It was also the custom that each tribunal should apply a different legislation, and should judge according to its special procedure. A first consequence of this mode of proceeding was, that at the moment parties entered into a contract, they could not know under what jurisdiction they would have to plead, if they were obliged, afterwards, to go to law. The interest of each contracting party, therefore, during the execution of the bargain, was necessarily to endeavour, in the prospect of a lawsuit, to get possession of the object in litigation, and to retain the sums he might have to pay, in order to be sure, as defendant, of being judged at his own consulate, before judges whom he knew, and who knew him, and according to his own laws. In a second place, when a plaintiff had before him several adversaries of different nationalities, he was obliged to enter into as many suits as there were defendants in the cause. It often resulted from this that there were as many contradictory judgments. The rules of equity are, doubtless, everywhere the same, and the principles of law which govern European legislations greatly resemble each other. It is, however, no less true that each of

Inter-
national
courts of
Egypt

the tribunals called upon to decide a certain case, might not consider the fact and the law in the same manner. A difficulty of the same nature was met with in matters where there was occasion for an action on a guarantee, for the defendant could not sue the person who guaranteed, when he was not of the same nationality as himself. In most cases, also, the tribunal could not take cognisance of cross claims, unless sometimes by way of compensation.

A very grave inconvenience further resulted in the appeal from consular sentences not being tried in Egypt. The plaintiff who had gained his cause, in the first instance, was compelled, at the call of his adversary, to plead his cause abroad, in a country where he knew no one, where it was difficult to defend himself, which often amounted, in fact, to a real denial of justice. As regarded criminal matters, the action of the Egyptian Government was null in matters of police ; infractions, grave or light, were committed by foreigners, but the Government, while responsible for the public peace, had no means of relieving itself of its responsibility ; its police were disarmed—that is, rather, the police of the different consulates—and, nevertheless, its responsibility still remained. When a crime was committed, the police had to ask for authority to arrest the foreign culprit, unless he were caught in the fact. When the culprit was arrested, the investigation was made by the consul, and the accused sent far away from the country which had been troubled by his crime ; proved criminals were often known to go about at liberty in the sight and to the knowledge of everyone : this state of things was discouraging to the administration, dangerous to all, and the natives were convinced that, when a foreigner was sent back to his country to be tried, it was for the purpose of withdrawing him from punishment. Moreover, the European colony itself was alarmed at the state of things.

An International Commission, represented by Egypt, Austria-Hungary, the North German Confederation, the United States, France, Great Britain, Italy, and Russia, having assembled at Cairo, on October 28, 1869, certain reforms proposed by the Egyptian Government in the administration of justice were examined. On November 10, 1874, certain judicial reforms were agreed on between the Khedive and the French Government, and on May 5, 1875, a similar

agreement was entered into between the Khedive and Germany. On July 31, 1875, it was agreed between the British and Egyptian Governments,¹ that all or any of the stipulations and reservations contained in the conventions relating to judicial reforms, concluded between the Egyptian and the French and German Governments, and any other arrangements which the Egyptian Government might have already made, or might thereafter make with any foreign Power on that subject, should be immediately and unconditionally extended by the Egyptian Government to Great Britain, and to

¹ The texts of the protocols whereby the French Government in 1874, and the German Government in 1875, respectively adhered to the Egyptian judicial reform, are set out in the *Annuaire de l'Institut de Droit International* for 1887, at p. 337. The English Convention of 1875 is in similar terms. The Egyptian Government for a long time after the establishment of these tribunals did not pay the debts, or damages, adjudged to be payable by it by virtue of sentences of these Courts. The reason alleged was incapacity to pay for want of means. The question of execution very rarely occurred, because in Egypt there is very little of the *Domaine Privé*, as opposed to the *Domaine Public*; the former is seizable, the latter is not, because it is affected to public uses. In the case of Keller v. the Egyptian Government, in 1876, the plaintiff, having established his claim before one of the tribunals to be paid all arrears of salary due to him as an officer of the Government, proceeded to place a sequester on the funds of the State lying in the Egyptian treasury. The Court of Appeal in 1878 overruled his right to sequester, on the ground that property of the *Domaine Public* could not be seized; but the Court of Appeal thought itself bound to note this judgment by a memorandum as follows:—‘The Court of Appeal has long demanded from the Egyptian Government the execution of the sentences given against it, and has for some months past pointed out that a crisis would arise, if the Government, availing itself of the limits imposed on the tribunals by the Judicial Treaty and the general principles of law on the insequestrability of the property of the State, should persist in avoiding the consequences of all adverse judgments. The Court is of opinion that the situation is not only derogatory to the dignity of the Egyptian Government, but that it will also irreparably compromise the judicial reform in Egypt if it is allowed to continue. The Court maintains, as a matter of great urgency, that it is necessary to assure to the creditors of the Government a protection as complete as that which the Courts accord to all parties in their legal relations with each other. The Court begs its President to transmit this declaration to the Egyptian Government, and further authorises its foreign members to communicate it to the Powers, in the hope that their intervention will lead to a prompt and satisfactory settlement.’

A copy of this was ordered by the Court to be forwarded to the Egyptian Government and to the seven Great Powers who had signed the Judicial Treaty. This led to a peremptory despatch from Germany, followed by similar notes from the other Powers. From that time all sentences of the Courts have been executed without difficulty, and the question has been completely laid at rest. If the creditors had contented themselves with levying execution on property of the *Domaine Privé*, such as palaces, yachts, salt-pits, &c., no difficulty would have occurred; for instance, in the case of the Gezireh Palace horses the International Court imprisoned and fined the Prefect of Cairo for resisting its writ, and the judgment was at once satisfied by payment.

British subjects, should the British Government at any time express a wish to that effect. The Reformed Tribunals were inaugurated by order of the Khedive on June 28, 1875, with power to entertain a mixed procedure between natives and foreigners. For the use of these tribunals, new Egyptian codes were drawn up, consisting of a Civil Code, a Code of Commerce, a Code of Marine Commerce, a Code of Civil and Commercial Procedure, a Penal Code, and a Code of the Criminal Process (*Instruction*): they were ordered to come into force on January 1, 1876.

Constitu-
tion of
these
tribunals

§ 31. The constitution of these tribunals is as follows :— There are three *tribunals* of first instance at Alexandria, Cairo, and Zagazig. Each tribunal is composed of seven inferior judges (*juges*), four being foreigners, and three natives. The judgments are delivered by five of these judges, of whom three must be foreigners and two be natives. One of the foreigners presides, with the title of Vice-President, and is chosen by the decided majority of the foreign and native members of the tribunal. In commercial matters the tribunal associates to itself two merchants, one foreigner and one native ; they have the right of deliberation, and are chosen by election. There is at Alexandria a superior tribunal, or *Court of Appeal*, composed of eleven superior judges (*magistrats*), four being natives and seven being foreigners. One of these foreign judges presides, under the title of Vice-President, and is chosen in the same manner as the vice-presidents of the lower tribunals. The decrees of the Court of Appeal are made by eight of the superior judges, of whom five must be foreigners and three be natives. Both at the Court of Appeal, and at each tribunal, there are sworn interpreters chosen by the Government. These tribunals alone take cognisance of all disputes in civil and commercial matters, between natives and foreigners, and between foreigners of different nationality, not affecting the personal status (*en dehors du statut personnel*). They are to take cognisance also of all real actions (*actions réelles immobilières*) between all persons, even belonging to the same nationality. The Government, the Administrations, the Dairas (the administration of the personal estate) of His Highness the Khedive, and of the members of his family, are justiciable in these tribunals, in process with foreigners. These tribunals, without being

able to adjudicate upon property of the public domain (*domaine public*), or to interfere with or to arrest the execution of an administrative measure, may adjudicate, in cases provided by the Civil Code, in any attempt directed against a right acquired by a foreigner by an act of administration. Demands of foreigners against a religious (*pieux*) establishment, claiming the real property possessed by such an establishment, are not to be submitted to these tribunals ; but these tribunals may determine on the intended demand, on the question of legal possession, without reference to whom may be the plaintiff or defendant. The fact alone of the existence of a *hypothèque* (mortgage) in favour of a foreigner on real property, without reference to the *possesseur* and to the *propriétaire*, renders these tribunals competent to determine on the validity of the *hypothèque* and on all its consequences, up to and including the forced sale of the realty, as well as the distribution of the proceeds. All proceedings are conducted in the language of the country, Italian and French. The execution of the judgments takes place apart from all administrative consular action or otherwise, and is on the order of the tribunal. It is carried out by the officers of the tribunal, with the assistance of the local authorities, should the same be necessary, but always apart from all administrative interference. The officer charged with the execution is obliged to warn the consulate involved of the day and hour of the execution, under pain of nullity and of damages against himself. The consul so warned has the means of being present at the execution, but in case of his absence, the matter is proceeded with, notwithstanding. In case of silence, insufficiency, or obscurity of law, in the Codes above mentioned, the judges may adopt the principles of natural law and of the rules of equity. In Criminal matters, in the case of foreigners, the judge of infractions (*contraventions*) is one of the foreign members of the tribunal. The Council Room (*chambre de conseil*), both in matters of offences (*délits*) and in matters of crimes, is composed of three judges, of whom one must be a foreigner and two be natives, and of four foreign assessors. The Police Court (*tribunal correctionnel*) is composed in like manner. The Assize Court is composed of three Councillors, one native and two foreigners ; the twelve jurymen are foreigners. Half the assessors and jury

may at the demand of the accused be of his nationality. The consul of the accused must without delay be advised of all prosecutions for crimes or offences directed against the latter. The examination and the trial are to be in the judicial language which the accused knows. Except in the case of a flagrant offence, or of a call from within a house, no house of a foreigner may be entered during the night, save in the presence of the consul or his delegate, unless the consul had authorised it to be entered in his absence. If the consul claims that a matter in prosecution appertains to his jurisdiction and that it ought to be submitted to his tribunal, the question, if contested by the Egyptian Government, is to be referred to the arbitration of a council composed of two councillors or judges, chosen by the president of the court, and of two consuls, chosen by the consul of the accused.

CHAPTER XII

DETERMINATION OF NATIONAL CHARACTER

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§ 1. NATIONAL CHARACTER may be determined from origin, naturalisation, domicil, residence, trade, or other circumstances. That which results from birth or parentage, follows the individual wherever he may be, till it is changed in one of the modes established or recognised by law : such as expatriation, naturalisation, domiciliation, &c. Native allegiance is a legal incident of birth, and is the implied fidelity and obedience due from every person to the political sovereignty under which he is born. This is a principle of universal law, and is sanctioned alike by international jurisprudence and by the municipal codes of all countries.¹ How far, and in what manner, this

National
character,
how de-

¹ ' *Local* allegiance is such as is due from an alien or stranger born, for so long a time as he continues within the King's dominion and protection ; and it ceases the instant such stranger transfers himself from this kingdom to another.' (Blackst., *Comm.*, vol. i. 457.) ' *Natural* allegiance is perpetual, local allegiance is only temporary ; and for this reason, evidently founded upon the nature of government, that allegiance is a debt due from the subject, upon an implied contract with the prince,

primitive allegiance may be dissolved or transferred, are questions which, perhaps, belong rather to municipal than to general public law, for the international *status* of the individual may be determined, at least in many cases, without regard to his allegiance, whether native or acquired. In others, however, this question must be considered in connection with the right of expatriation and naturalisation. It may be proper to remark in this place that, inasmuch as the national character, which results from origin, continues till legally changed, the *onus* of proving such change usually rests upon the party alleging it.¹

Rights of
the State

§ 2. It has already been remarked, that every independent State has, as one of the incidents of its sovereignty, the right of municipal legislation and jurisdiction over all persons within its territory, whether its own subjects or foreigners, commorant in the land. With respect to its own subjects, this right, it is claimed, includes not only the power to prohibit their egress from its territory, but also to recall them from other countries; and, with respect to commorant foreigners, not only to regulate their local obligations, but to confer upon them such privileges and immunities as it may deem proper. It may, therefore, change their nationality by what is called *naturalisation*. It is believed that every State in Christendom accords to foreigners, with more or less restrictions, the right of naturalisation, and that each has some positive law or mode of its own for naturalising the native-born subjects of

that so long as the one affords protection, so long will the other demean himself faithfully.' (*Ibid.*) 'A *denizen*,' said Lord Bacon in his speech as counsel in Calvin's case (7 *Coke R.*, 27), 'is one that is but *subditus insitivus*, or *adoptivus*, a subject engrafted or adopted, and is never by birth, but only by the King's charter, and by no other means, come he never so young into the realm or stay he never so long. Manison or habitation will not indenise him; no, nor swearing obedience to the king in a leet, which doth in law the subject, but only, as I said, by the king's grace and gift. To this person the law giveth an ability and capacity abridged, not in matter but in time. And as there was a time when he was not subject, so the law doth not acknowledge him before that time. For if he purchase freehold after his denisation he may take it, but if he have purchased any before he shall not hold it; so if he have any children after, they shall inherit it; but if he have any before they shall not inherit.'

A denizen, therefore, may be considered to be a person on whom the king, by his own authority, was empowered to bestow certain of the privileges of a British subject. Letters of denisation are still granted in England.

¹ Westlake, *Private International Law*, §§ 7 et seq.; Phillimore, *On Int. Law*, vol. i. §§ 315 et seq.; Reg. v. Arnaud, 9, O. B., 817.

other States, without reference to the consent of the latter for the release or transfer of the allegiance of such subjects. It seems, therefore, that, so far as the practice of nations is concerned, the right of naturalisation is universally claimed and exercised, without any regard to the municipal laws of the States whose subjects are so naturalised. It may also be remarked that this right, as a general proposition, is admitted and affirmed by most writers of acknowledged authority on international law. From the generality and extent of this right of naturalisation, it has been inferred that the right of expatriation is equally broad and comprehensive. And this inference is undoubtedly correct, so far as the rules of general public law are applicable ; or, in other words, so far as they do not conflict with the proper exercise of the municipal power of particular States, within the limits of their own territory. But it is claimed that each State has the exclusive power to permit or deny the exercise of this right to its own citizens, within the orbit of its own jurisdiction. At any rate, this right of municipal legislation is exercised almost as generally as that of naturalisation.¹

§ 3. The laws of Great Britain permit the naturalisation of foreigners without requiring an abjuration, by the new subjects, of their original sovereign or country. Prior to 1844, an Act of Parliament was necessary in each particular case ; and now aliens may be naturalised as British subjects on application to one of the principal secretaries of State.²

¹ Foelix, *Droit International Privé*, §§ 27-55 ; Cushing, *Opinions of U.S. Attys.-Genl.*, vol. viii. pp. 125 et seq. ; Dou, *Derecho Público*, t. i. cap. xvii. ; Riquelme, *Derecho Internacional*, t. i. p. 319 ; Heffter, *Droit International*, § 59 ; Bello, *Derecho Internacional*, pt. ii. cap. v. § i.

² The British Naturalisation Act, 1870 (33 Vict., c. 14), contains (*inter alia*) the following provisions :—

‘ 2. Real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject, and a title to real and personal property of every description may be derived through, from, or in succession to an alien in the same manner in all respects as through, from, or in succession to a natural-born British subject : provided,—

‘ (1) That this section shall not confer any right on an alien to hold real property situate out of the United Kingdom, and shall not qualify an alien for any office, or for any municipal, parliamentary, or other franchise.

‘ (2) That this section shall not entitle an alien to any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly given to him.

‘ (3) That this section shall not affect any estate or interest in real or personal property to which any person has or may become entitled,

In every country of continental Europe the executive branch of the government possesses the power of naturalisation, sub-

either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before the passing of this Act or in pursuance of any devolution by law on the death of any person dying before the passing of this Act.

‘3. Where her Majesty has entered into a Convention with any foreign State to the effect that the subjects or citizens of that State, who have been naturalised as British subjects, may divest themselves of their status as such subjects, it shall be lawful for her Majesty by Order in Council to declare that such Convention has been entered into by her Majesty, and from and after the date of such order in council any person being originally a subject or citizen of the State referred to in such order, who has been naturalised as a British subject, may, within such limit of time as may be provided in the Convention, make a declaration of alienage, and from and after the date of his so making such declaration, such person shall be regarded as an alien and as a subject of the State to which he originally belonged as aforesaid.

‘A declaration of alienage may be made as follows : that is to say, if the declarant be in the United Kingdom, in the presence of any justice of the peace ; if elsewhere in her Majesty’s dominions, in the presence of any judge of any court of civil or criminal jurisdiction, of any justice of the peace, or of any other officer for the time being authorised by law, in the place in which the declarant is, to administer an oath for any judicial or other legal purpose. If out of her Majesty’s dominions, in the presence of any officer in the diplomatic or consular service of her Majesty.

‘4. Any person, who by reason of his having been born within the dominions of her Majesty, is a natural-born subject, but who also at the time of his birth became under the law of any foreign State a subject of such State, and is still such subject, may, if of full age and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration of alienage such person shall cease to be a British subject. Any person who is born out of her Majesty’s dominions of a father being a British subject may, if of full age, and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration shall cease to be a British subject.

‘5. From and after the passing of this Act, an alien shall not be entitled to be tried by a jury *de medietate linguæ*, but shall be triable in the same manner as if he were a natural-born subject.

‘6. Any British subject who has at any time before, or may at any time after, the passing of this Act, when in any foreign State and not under any disability, voluntarily become naturalised in such State, shall, from and after the time of his so having become naturalised in such foreign State, be deemed to have ceased to be a British subject and be regarded as an alien : provided,—

‘(1) That where any British subject has before the passing of this Act voluntarily become naturalised in a foreign State, and yet is desirous of remaining a British subject, he may at any time, within two years after the passing of this Act, make a declaration that he is desirous of remaining a British subject, and upon such declaration hereinafter referred to as a declaration of British nationality being made, and upon his taking the oath of allegiance, the declarant shall be deemed to be and to have been continually a British subject ; with this qualification, that he shall not, when within the limits of the foreign State in which he has been naturalised, be deemed to be a British subject, unless he has ceased to be a subject of that State,

ject, in some cases, to certain specified restrictions. A distinction, however, is generally made between the native and

in pursuance of the laws thereof, or in pursuance of a treaty to that effect :

‘(2) A declaration of British nationality may be made, and the oath of allegiance be taken, as follows ; that is to say—if the declarant be in the United Kingdom, in the presence of a justice of the peace ; if elsewhere in her Majesty’s dominions, in the presence of any judge of any court of civil or criminal jurisdiction, of any justice of the peace, or of any other officer for the time being authorised by law in the place in which the declarant is to administer an oath for any judicial or other legal purposes. If out of her Majesty’s dominions, in the presence of any officer in the diplomatic or consular service of her Majesty.

‘7. An alien who, within such limited time before making the application hereinafter mentioned as may be allowed by one of her Majesty’s principal secretaries of State, either by general order or on any special occasion, has resided in the United Kingdom for a term of not less than five years, or has been in the service of the Crown for a term of not less than five years, and intends when naturalised either to reside in the United Kingdom, or to serve under the Crown, may apply to one of her Majesty’s principal secretaries of State for a certificate of naturalisation. The applicant shall adduce in support of his application such evidence of his residence or service, and intention to reside or serve, as such Secretary of State may require. The said Secretary of State, if satisfied with the evidence adduced, shall take the case of the applicant into consideration, and may with or without assigning any reason give or withhold a certificate, as he thinks most conducive to the public good, and no appeal shall lie from his decision, but such certificate shall not take effect until the applicant has taken the oath of allegiance.

‘An alien to whom a certificate of naturalisation is granted shall in the United Kingdom be entitled to all political and other rights, powers, and privileges, and be subject to all obligations to which a natural-born British subject is entitled or subject in the United Kingdom, with this qualification, that he shall not, when within the limits of the foreign State of which he was a subject previously to obtaining his certificate of naturalisation, be deemed to be a British subject unless he has ceased to be a subject of that same State in pursuance of the laws thereof, or in pursuance of a treaty to that effect.

‘The said Secretary of State may in manner aforesaid grant a special certificate of naturalisation to any person with respect to whose nationality as a British subject a doubt exists, and he may specify in such certificate that the grant thereof is made for the purpose of quieting doubts as to the right of such person to be a British subject, and the grant of such special certificate shall not be deemed to be any admission that the person to whom it was granted was not previously a British subject.

‘An alien who has been naturalised previously to the passing of this Act may apply to the Secretary of State for a certificate of naturalisation under this Act, and it shall be lawful for the said Secretary of State to grant such certificate to such naturalised alien upon the same terms and subject to the same conditions in and upon which such certificates might have been granted if such alien had not been previously naturalised in the United Kingdom.’

8. [This provides for re-admission to British nationality.]

‘10. The following enactments shall be made with respect to the national status of women and children :—

‘(1) A married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject ;

naturalised citizen with respect to political rights. By the constitution of the United States, Congress have power to establish a uniform rule of naturalisation, and this power is recognised by the supreme court as being exclusive of that of the individual States. The Act of March 26, 1790, prescribed the taking of an oath or affirmation to support the constitution, but required no abjuration of former allegiance. The Act of January 29, 1795, required, among other things, a renunciation of all foreign allegiance, particularly to the prince or State of whom the applicant was a subject or citizen. These have been followed by the later Acts of June 18, 1798, April 14, 1802, March 26, 1804, May 26, 1824, July 17, 1862, and of July 27, 1868. There is much less uniformity in the municipal codes of different States with respect to denationalisation. Subject to the Act of 1870, the English jurists and publicists almost unanimously deny the right of expatriation, to the extent of a change of primitive allegiance, without the consent of the liege lord. By the laws of France, a Frenchman loses his native character by naturalisation in a foreign country, by accepting office under a foreign Government without the permission of his own, or by so establishing himself abroad as to show an intention of never returning. In Austria national character is lost by authorised emigration from the empire *sine animo revertendi*; it is equally lost

‘(2) A widow, being a natural-born British subject, who has become an alien by or in consequence of her marriage, shall be deemed to be a statutory alien, and may as such at any time during widowhood obtain a certificate of readmission to British nationality in manner provided by this Act :

‘(3) Where the father being a British subject, or the mother being a British subject and a widow, becomes an alien in pursuance of this Act, every child of such father or mother who during infancy has become resident in the country where the father or mother is naturalised, and has, according to the laws of such country, become naturalised therein, shall be deemed to be a subject of the State of which the father or mother has become a subject, and not a British subject :

‘(4) Where the father, or the mother being a widow, has obtained a certificate of readmission to British nationality, every child of such father or mother who during infancy has become resident in the British dominions with such father or mother, shall be deemed to have resumed the position of a British subject to all intents :

‘(5) Where the father, or the mother being a widow, has obtained a certificate of naturalisation in the United Kingdom, every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom, shall be deemed to be a naturalised British subject.

‘14. Nothing in this Act contained shall qualify an alien to be the owner of a British ship.’

if effected without permission, and in such case is punished by sequestration of property. In Germany the subject loses his national character by unauthorised emigration, except in the case of a German naturalised in the United States, who has the benefit of the treaty made in 1868 between the North German Confederation and the United States.¹ In Russia the quality of a subject is lost by residence abroad, by voluntary expatriation, and by disappearance for the term of ten years from the place of his domicil. Notwithstanding the Russian laws of March 6, 1864, a subject is not released from his allegiance by the acquisition of a foreign nationality. Spain and the Spanish American Republics contemplate the voluntary expatriation of their citizens, and provide for the loss of Spanish nationality upon the acquisition of a new national character. In several of the States of the American union expatriation is provided for and regulated by law, but this has reference only to allegiance due to the State, citizenship of a State being essentially different from citizenship of the United States, and a renunciation of allegiance to the former does not draw after it a renunciation of allegiance to the latter.² The doctrine of perpetual allegiance having been

¹ By the Prussian law the character was lost by sentence of a competent authority, by living ten years in a foreign country, or by marriage (if a female Prussian subject) with a foreigner. Subjects living in a foreign country may lose their quality as Prussians, by a declaration of the police authorities of Prussia, if they do not obey within the time fixed to them the express summons for returning to their country. Prussian subjects who either (1) leave the States without permission, and do not return within ten years, or (2) leave the States with permission, but do not return within ten years after the expiration of the time granted by the said permission, lose their quality as Prussian subjects. The entering of a subject into public service in a foreign State is allowed only after his discharge has been granted to him. Anyone who has obtained it is permitted to do so without restriction. A Prussian subject who (1) either takes public service in a foreign State with the immediate permission of his own Government, or (2) is appointed in Prussian States by a foreign power in an office established with Prussian permission, as, for instance, that of consul, commercial agent, &c., remains in his quality as a Prussian.

² The conditions of citizenship in the United States and of any one of the States are not identical, that is to say, it may happen that by the laws of a given State a person shall be a citizen thereof and still not be a citizen of the United States. Nor does it follow because he is a citizen of a given State by the very letter of its laws that, therefore, he is of every or any other State. Persons may be, and in fact are, citizens of the State of Massachusetts—that is, invested with all the rights, political and municipal, which its institutions can bestow—without being citizens of the State of Virginia or of the United States. There are certain material advantages attached to citizenship. Many ordinary municipal

one of the settled principles of the English common law, was necessarily part of the law of the United States during the earlier period of its history. But by the Act of July 27, 1868, Congress declared that the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the right of life, liberty, and the pursuit of happiness, and that to question the right of expatriation is inconsistent with the fundamental principles of the State. Treaties recognising the right of expatriation have been exchanged between the United States and the North German Confederacy in 1868, with Bavaria in 1868, with Baden in 1868, with Würtemberg in 1868, with Belgium in 1868, with Hesse in 1869, with Austria in 1870, with Great Britain in 1870.¹ Apart from legislation, the decisions of the Federal

rights are by other laws capable of being enjoyed by citizens alone, such as the ownership of merchant ships, the command and in part the manning of such ships, and the purchase of public lands by pre-emption. To this may be added that, in many of the States, the right to own land, within the same, is by their laws restricted to citizens of the United States. (See *Opinions of Attys.-Genl. of U. S.*, vol. viii. p. 139.)

In July, 1864, a question was raised as to the position of British subjects residing at Memphis, U.S., then under martial law, and Lord Lyons was instructed to inform them that Great Britain could not interfere with the operation of that law in a foreign State, and that British subjects who wished to secure British protection must discontinue their residence in places under such military control. (*Parl. Papers*, No. 363, 1864.)

¹ The Treaty of Naturalisation between Great Britain and the United States, signed May 13, 1870, includes (*inter alia*) the following articles:—

‘ARTICLE I. British subjects who have become, or shall become, and are naturalised according to law within the United States of America as citizens thereof, shall, subject to the provisions of Article II., be held by Great Britain to be in all respects and for all purposes citizens of the United States, and shall be treated as such by Great Britain. Reciprocally, citizens of the United States of America who have become, or shall become, and are naturalised, according to law within the British dominions as British subjects, shall, subject to the provisions of Article II., be held by the United States to be in all respects and for all purposes British subjects, and shall be treated as such by the United States.

‘ARTICLE II. Such British subjects as aforesaid who have become, and are naturalised, as citizens within the United States, shall be at liberty to renounce their naturalisation and to resume their British nationality, provided that such renunciation be publicly declared within two years after the twelfth day of May, 1870. Such citizens of the United States as aforesaid, who have become and are naturalised, within the dominions of her Britannic Majesty, as British subjects, shall be at liberty to renounce their naturalisation and to resume their nationality as citizens of the United States, provided that such renunciation be publicly declared within two years after the exchange of the ratifications of the present convention. The manner in which this renunciation may be made and

courts were generally with reference to expatriation and change of national character in time of war, recognising, however, in common with the admiralty tribunals of England, a publicly declared shall be agreed upon by the Governments of the respective countries.

'ARTICLE III. If any such British subject as aforesaid, naturalised in the United States, should renew his residence within the dominions of her Britannic Majesty, her Majesty's Government may, on his own application and on such conditions as that Government may think fit to impose, readmit him to the character and privileges of a British subject, and the United States shall not in that case claim him as a citizen of the United States on account of his former naturalisation. In the same manner, if any such citizen of the United States as aforesaid, naturalised within the dominions of her Britannic Majesty, should renew his residence in the United States, the United States Government may, on his own application and on such conditions as that Government may think fit to impose, readmit him to the character and privileges of a citizen of the United States, and Great Britain shall not in that case claim him as a British subject on account of his former naturalisation.'

The Act 35 and 36 Vict. c. 39 amends 33 Vict. c. 14, and also renders valid any renunciation made in manner provided by the supplementary Convention between Great Britain and the United States, of Feb. 23, 1871, of which the two principal articles are as follows :—

'ART. I. Any person being originally a citizen of the United States, who had previously to May 13, 1870, been naturalised as a British subject, may, at any time before August 10, 1872, and any British subject who, at the date aforesaid, had been naturalised as a citizen within the United States, may, at any time before May 12, 1872, publicly declare his renunciation of such naturalisation, by subscribing an instrument in writing, substantially in the form hereunto appended, and designated as Annex A. Such renunciation by an original citizen of the United States of British nationality shall, within the territories and jurisdiction of the United States, be made in duplicate in the presence of any court authorised by law for the time being to admit aliens to naturalisation, or before the clerk or prothonotary of any such court; if the declaration be beyond the territories of the United States, it shall be made in duplicate before any diplomatic or consular officer of the United States. One of such duplicates shall remain on record in the custody of the court or officer in whose presence it was made; the other shall be, without delay, transmitted to the department of State. Such renunciation, if declared by an original British subject of his acquired nationality as a citizen of the United States, shall, if the declarant be in the United Kingdom of Great Britain and Ireland, be made in duplicate, in the presence of a justice of the peace; if elsewhere in her Britannic Majesty's dominions, in triplicate, in the presence of any judge of civil or criminal jurisdiction, of any justice of the peace, or of any other officer for the time being authorised by law, in the place in which the declarant is to administer an oath for any judicial or other legal purpose; if out of her Majesty's dominions, in triplicate, in the presence of any officer in the diplomatic or consular service of her Majesty.

'ART. II. The contracting parties hereby engage to communicate each to the other, from time to time, lists of the persons who, within their respective dominions and territories, or before their diplomatic and consular officers, have declared their renunciation of naturalisation, with the dates and places of making such declarations, and such information as to the abode of the declarants, and the times and the places of their naturalisation, as they may have furnished.'

change of domicile for commercial purposes. Chancellor Kent was of opinion, from an historical review of the principal decisions in the Federal courts, that a citizen could not renounce his allegiance to the United States, without the permission of the Government, to be declared by law ; on the other hand, Chief Justice Robertson considered that allegiance, whether local or national, was altogether conventional, and might be repudiated by the nation, as well as by adopted citizens, with the presumed concurrence of the Government, without its formal or express sanction ; yet that a citizen who had, in good faith, abjured his country, and become a subject or citizen of a foreign nation, should, as to his native government, be considered as denationalised. Mr. Attorney-General Cushing was of the same opinion ; ‘expatriation,’ he says, ‘is a general right, subject to regulation of time and circumstances, according to public interests, and the requisite consent of the State, presumed where not negatived by standing prohibitions.’¹

Apparent
conflict
between
allegiance
and
natural-
isation

§ 4. It is thus seen that, while public international law recognises the right of one State to naturalise the native subjects of another, and consequently the right of such subjects to change their nationality, it also recognises the right of this other State to regulate the allegiance of its own subjects, and to regulate or prohibit their expatriation. There is an apparent inconsistency in these two rules, for how can any particular State, by its municipal law, qualify a general maxim of international jurisprudence, or prevent the application to its own subjects of an established principle of public law ? This inconsistency, however, is more apparent than real. It must be remembered, that although international law recognises the right of one State to naturalise or adopt the subjects

¹ Cushing, *Opinions of U. S. Attys.-Genl.*, vol. viii. pp. 125 et seq. ; Gunther, *Das Europäische Völkerrecht*, b. ii. p. 309 ; Wheaton, *Elem. Int. Law*, app. No. i. ; Jenkins, *Life of Sir L.*, vol. ii. p. 713 ; May, *Droit Public de Bavière*, tome ii. §§ 159, 160 ; Weishaar, *Droit Privé de Wurtemberg*, tome i. §§ 74-78 ; *Revue Etrangère*, tome i. pp. 552, 553 ; Bowyer, *Constit. Law of England*, p. 406 ; Kent, *Com. on Am. Law*, vol. ii. p. 49 ; *Inglis v. Sailors' Snug Harbour*, 3 *Peters R.*, 125 ; *Talbot v. Janson*, 3 *Dal. R.*, 383 ; the *United States v. Williams*, 2 *Cranch R.*, 82, note ; *Janson v. the 'Christina Magdalena'*, *Bee's R.*, 11 ; the *United States v. Gillies*, 1 *Peters C. C. R.*, 159 ; *Shanks v. Dupont*, 3 *Peters R.*, 242 ; *Ainslie v. Martin*, 6 *Mass. R.*, 460 ; *Jackson v. Burns*, 3 *Binney R.*, 75 ; *Murray v. McCarty*, 2 *Mumf. R.*, 393 ; *Alsberry v. Hawkins*, 9 *Dana R.*, 177 ; *Burlamaqui, Droit de la Nature*, pt. ii. ch. v. § 13 ; *Almeda, Derecho Público*, tomo i. cap. xvii.

of another, it is not *in virtue of this public law* that such citizen is naturalised or adopted, but *by virtue of the positive or municipal laws of the country* which naturalises or adopts them. The *newly made* citizen is entirely the *creature* of municipal law, and is invested only with such rights, privileges, and immunities as that law is capable of conferring upon him. So, on the other hand, while international law recognises the right of one State to retain the allegiance of its subjects, or to expatriate them, the tie which binds them is not formed, or its nature determined, by *public law*, but by the *municipal code* of such State. As the municipal law *makes* the citizen by naturalisation, so, also, it *retains* or *unmakes* him, by retaining or dissolving his allegiance. Admitting, then, that the right of expatriation, in its broadest and most comprehensive sense, is recognised as a maxim of international law, this principle must be subordinate to the universally conceded doctrine of the same law, that every independent State possesses exclusive sovereignty within its own territory, that its laws bind all persons within its own jurisdiction, but cannot operate within the territory of another power. It results from this view of the question, that so long as the naturalised citizen remains within the territory and jurisdiction of his adopted country, or within the jurisdiction of any other State than that which claims his primitive allegiance, he retains the national character conferred upon him by naturalisation. But if, having renounced his primitive allegiance without the consent of his government, and contrary to its laws, he returns to his native State, and places himself within its jurisdiction, he is subject to the obligations, charges, and penalties which the laws of that State have imposed upon him. And this result seems to have been formerly acquiesced in by the executive department of the government of the United States. With respect to the general right of expatriation and naturalisation, the cases of Koszta and of Tousig have already been considered at p. 111. In the case of J. P. Knacke, a naturalised citizen of the United States, who, on his return to his native country (Prussia), had been forced into the Prussian military service, Mr. Wheaton, the American minister at Berlin (July 24, 1840), said: 'Had you remained in the United States, or visited any other foreign country (except Prussia) on your lawful business, you would have

been protected by the American authorities at home and abroad, in the enjoyment of all your rights and privileges as a naturalised citizen of the United States. But having returned to the country of your birth, *your native domicil and national character revert* (so long as you remain in the Prussian dominions), and you are bound in all respects to obey the laws exactly as if you had never emigrated.' In the case of Ignacio Tolen, a native of Spain, but naturalised in the United States, Mr. Secretary Webster (June 25, 1852), said : 'If that government (Spain) recognises the right of its subjects to denationalise themselves and assimilate with the citizens of other countries, the usual passport will be a sufficient safeguard to you ; but, if allegiance to the crown of Spain may not legally be renounced by its subjects, you must expect to be liable to the obligations of a Spanish subject, if you voluntarily place yourself within the jurisdiction of that government.' Again, in the case of Victor B. Depierre, a native of France, naturalised in the United States, Mr. Webster (June 1, 1852) said : 'If, as is understood to be the fact, the government of France does not acknowledge the right of natives of that country to renounce their allegiance, it may lawfully claim their services when found within French jurisdiction.' Mr. Secretary Everett, in a dispatch to the American minister at Berlin (January 14, 1853), says : 'If a subject of Prussia, lying under a legal obligation in that country, to perform a certain amount of military duty, leaves his native land, and without performing that duty, or obtaining the prescribed certificate of emigration, comes to the United States and is naturalised, and afterward, for any purposes whatever, goes back to Prussia, it is not competent for the United States to protect him from the operation of the Prussian law.' Mr. Secretary Cass, in the case of Le Clerc, in 1859, seemed to rest this question upon the same ground as his predecessors ; but in the case of Hofer (June 14, 1859), and in his dispatch to the American minister at Berlin (July 8, 1859), he took the position that 'the doctrine of perpetual allegiance is a relic of barbarism,' repudiated by the United States 'ever since the origin of our government.' 'The moment a foreigner becomes naturalised, his allegiance to his native country is severed for ever. He experiences a new political birth. A broad and impassable line separates him

from his native country. He is no more responsible for anything he may say or do, or omit to say or do, after assuming his new character, than if he had been born in the United States. Should he return to his native country, he returns as an American citizen, and in no other character. In order to entitle his original government to punish him for an offence, this must have been committed whilst he was a subject, and owed allegiance to that government. The offence must have been complete before his expatriation. It must have been of such a character that he might have been tried and punished for it at the moment of his departure. A future liability to serve in the army will not be sufficient, because, before the time can arrive for such service, he has changed his allegiance, and has become a citizen of the United States.' This position is certainly somewhat in advance of that assumed in the previous diplomatic correspondence of the United States. If this view of Mr. Cass be correct, the right of expatriation is not only general but indefeasible, except in the single case specified, of offences by a native against his State which are *completed* and punishable at the moment of his departure, and before his voluntary expatriation. Treason, then, committed by a subject, *after* 'the moment of his departure' from his own country, if not 'complete before his expatriation,' is not liable to punishment, should he return to his native State with his certificate of foreign naturalisation, for his adopted country may claim him as its own subject, and enforce his release. Moreover, it would be bound to do so, as much as if he were native-born, and never had owed any other allegiance.¹

¹ *American State Papers, For. Rel.*, vol. i. p. 169; Marcy, *Letter on Kosztla's Case*, Sept. 26, 1853; Wheaton, *Elem. Int. Law*, pt. ii. ch. ii. § 6, note; Webster's *Works*, vol. vi. p. 521; Gardner, *Institutes*, pp. 448 et seq.; Webster, *Letter to Sharkey*, July 5, 1852; *Cong. Doc's*, 32nd Cong., 1st sess. H. R., *Ex. Doc.*, No. 10; 33rd Cong., 1st sess. H. R., *Ex. Doc.*, No. 41.

Æneas Macdonald was tried at the court of King's Bench, in 1747, before Lord Chief Justice Lee, for having been concerned in the rebellion of 1745. He pleaded that he was an alien born in France, and had acted under a French commission, thereby entitling him to the privileges of the cartel between England and France for the exchange or ransom of prisoners. The court declared that it never was doubted that *a subject born, taking a commission from a foreign prince, and committing high treason, may be punished notwithstanding his foreign commission*. Macdonald was found guilty of high treason. He was afterwards pardoned on condition of his leaving the realm. (*State Trials*, xviii.) The leniency

Allegi-
ance does
not affect
personal
domicil

§ 5. But whatever may be thought of the effect of the doctrine of allegiance upon the national character of the subject within his native State, it certainly can produce no effect without the limits of its jurisdiction, for, even admitting that doctrine in its full extent, the obligations resulting therefrom are binding only within the State to which the individual originally belonged, without affecting, with reference to his adopted country, the validity of his naturalisation there. And the nationality thus assumed must, according to the rules of international jurisprudence, be recognised by all other States except that which claims his primitive allegiance, until it is again changed by the municipal code of some State within whose jurisdiction he may eventually place himself. Nor does this abstract question of native allegiance affect national character, as determined by personal domicil ; for it is a general rule of public law that every person of full age has a right to change his nationality by choosing another domicil. It follows, then, that when a person who has attained his majority removes to another place, and settles himself there, he is stamped with the national character of his new domicil ; and this is so, notwithstanding he may entertain a floating intention of returning to his original residence or citizenship at some future period.

Nor com-
mercial
domicil

§ 6. The national character of a merchant is determined by his *commercial domicil*, and not by the country to which his allegiance is due, either by his birth, or by his subsequent naturalisation or adoption. He is regarded as a political

shown to him contrasts with the treatment of Elija Clarke, a native of the United States, who was hanged by the Americans as a traitor and spy in 1812, though he also set up the defence that he was an alien, having been domiciled in Canada. (Braken.—*Miscell.*, 409.)

By the common law of England, all persons above the age of twelve years were formerly required to take the oath of allegiance in court leet, and by several statutes the oath of *allegiance* was required to be taken under penalties. (See 1 Eliz. c. 1 ; 1 W. and M. c. 18 ; 1 A. st. 1, c. 22.)

By British proclamation of Feb. 19, 1793, it was declared that all seafaring men, being natural-born subjects, in the pay of any foreign State or service of any foreign vessel, were ordered, according to 'their known and bounden duty and allegiance,' to quit such foreign service and return home ; that no seamen were to engage themselves to any State or vessel without a license ; that any offenders would be proceeded against for their contempt, and if taken by the Turks, Algerines, or any others, would not be reclaimed as subjects of Great Britain. A similar proclamation was issued in 1807, further declaring that no letters of naturalisation or certificates of citizenship could divest natural-born subjects of their allegiance or duty.

member of the nation into which, by his residence and business, he is incorporated, and as a subject of the government which protects him in his pursuits, and to the support of which he contributes by his property and his industry. This rule of decision is adopted both in prize courts and in courts of common law, and is applied, in a belligerent country, to its own native subjects, as well as to those of a neutral power. Thus, a citizen of the United States who is settled abroad, during a war to which his government is a party, is, with respect to his property and trade, subject to all the disabilities of an alien enemy, or entitled to all the privileges of a neutral, according to the hostile or neutral character of the country in which he has fixed his domicil.¹

§ 7. The legal term *domicil* has been variously defined. Domicil
defined According to the Roman law, 'In whatever place an individual has set up his household gods, and made the chief seat of his affairs and interests, from which, without special avocation, he has no intention of departing; from which, when he has departed, he is considered to be from home; and to which, when he has returned, he is considered to have returned home:—in that place, there is no doubt whatever, he has his domicil.' Proudhon considers 'domicil to consist of the *moral relation* subsisting between a man and the place of his residence,' as distinguished from *physical existence* or actual residence. Phillimore says: 'Domicil answers very much to the common meaning of our word *home*, and where a person possessed two residences, the phrase *he made the latter his home*, would point out that to be his domicil.' He, however, considers the definition of Judge Rush, in the American case of *Guier v. Daniel*, as the best—viz., 'a residence at a particular place, accompanied with positive or presumptive proof of intention to remain there for an unlimited time.'²

¹ Dalloz, *Répertoire*, verb. 'Domicile,' § 34; *Wilson v. Marryatt*, 8 *Term. R.*, 31; the '*Vigilante*,' 1 *Rob.*, 1; the '*Endraught*,' 1 *Rob.*, 19; the '*Frances*,' 1 *Gallis. R.*, 614.

The powers of a commercial traveller must be ruled by the laws of the place where they were granted, and not by those of the place where his business transactions are being carried on. (Superior Tribunal of Commerce of the German Empire at Leipsic, December 10, 1871.)

² Phillimore, *Law of Domicil*, §§ 11–16; D'Argentré, *Ad Leg. Britanorum*, art. ix. v. 4; Desquiron, *Traité du Domicile*, p. 42; Proudhon et Valette, *Des Personnes*, tome i. ch. ix.; *Guier v. Daniel*, 1 *Binney Rep.*, p. 349, note.

The following instructions were furnished to the Hon. W. Stuart, the

Divisions
of domicile

§ 8. Various decisions have been made by the different writers who have treated of domicile. Some authors have divided it into two kinds, *principal* and *accidental*, the former being the centre of a person's affairs, and the latter his place of residence for a part of his time, or for a particular purpose. Another division is into *personal* and *commercial*, the former having reference to a person's personal or actual residence, and the latter to his place of business or trade. Kent says: 'There is a *political*, a *civil*, and a *forensic* domicile.' This division is sufficiently explained by the terms employed. Others, again, divide domicile according to birth, necessity, and will, as, 1. Domicil of Origin (*Domicilium originis*); 2. Domicil by Operation of Law (*Domicilium Necessarium*); 3. Domicil of Choice (*Domicilium Voluntarium*). Domicil of origin has reference, *first*, to the place of nativity, and *second*, to the residence of the parents, where the birth takes place during a temporary or accidental absence from their own domicile. Domicil by operation of law comprises two classes, *first*, as determined by the laws of the State from which they are sent, as in the case of public officers employed in foreign countries, and persons exiled by way of punishment; and *second*, as

British Chargé d'Affaires in the U. S., in 1862:—'A domicile established by length of residence only, without naturalisation, or any other formal act whereby the domiciled person has, so to speak, incorporated himself into the State in which he resides, does not for the time convert him into a subject of the domicile, in all respects, save the allegiance he owes to his native sovereign. Such a domiciled person is not a *civis*, but a temporary subject, *subditus temporarius*, of the State in which he is resident. He cannot lawfully be compelled to serve in the military forces of that State against any other State, or be compelled to enrol himself in the militia of the State, though it would be his duty to co-operate with native citizens, when called upon to do so by the proper authorities, in keeping the peace and preserving good order in the particular place in which he resides, as for instance, against thieves and pirates.'

In accordance with these instructions, Lord Russell addressed a circular dispatch to the British Consuls in the Southern States, on October 11, in the same year, directing them to remonstrate strongly against the forced enlistment of British subjects, pointing out that British subjects, domiciled only by residence in the so-called Confederate States, could not be forcibly enlisted in the military service of those States by virtue of an *ex post facto* law, when no municipal law existed, at the time of the establishment of their domicile, rendering them liable to such service. It may be competent to a State in which a domiciled foreigner may reside to pass such an *ex post facto* law, if, at the same time, option is offered to foreigners affected by it to quit, after a reasonable period, the territory, if they object to serve in the armies of the State; but, without this option, such a law would violate the principles of international law, and even with such an option the comity till then observed between independent States would not be very scrupulously regarded.

determined by the laws of the place of residence. Domicil of choice may be considered, *first*, with reference to the laws of the place where a new residence is acquired, and *second*, with reference to the laws of the place where the former residence has been abandoned. All these are so intimately connected, and the latter so dependent upon the former, that it would be difficult to discuss each separately. We will, therefore, consider the general criteria of domicil, the rules of evidence applicable to different cases, the presumptions raised by law, and the proofs required to rebut these presumptions.¹

§ 9. The question of domicil is often a very difficult one to determine, and involves considerations which require to be weighed with peculiar care. It is also sometimes connected with circumstances of varied and conflicting import, which are well calculated to embarrass the mind of the most experienced judge. The great controlling principle, however, in determining domicil is the *intention* of the party. And when his intention to reside for an indefinite period or permanently, in the place where he is found, is established by proof, the length or brevity of his actual residence is of no avail to protect him from the consequences of the national character resulting from such residence. Thus, the property of a British merchant, who removed to a Dutch West India island but a day or two before it capitulated to British force, was condemned by a British court as that of an enemy, it being proved that he had gone there with the avowed design of forming a permanent establishment.²

§ 10. But *mere intention*, without some *overt act*, is not sufficient to determine domicil, for that intention is likely to be revoked every hour. Courts have, therefore, always required, in such cases, something more than a mere verbal declaration

¹ Kent, *Com. on Amer. Law*, vol. ii. pp. 429 et seq.

² The 'Diana,' 5 Rob., 60; the 'Venus,' 8 Cranch. R., 288; the 'Boedes Lust,' 5 Rob., 233; *Munro v. Munro*, 7 Cl. and Fin. R., 76; Merlin, *Répertoire*, verb. 'Domicile,' § 6.

'A mere intention to remove,' said Sir William Scott, 'has never been held sufficient without some overt act; being merely an intention, residing secretly and undistinguishably in the breast of the party, and liable to be revoked every hour. The expressions of the letter, in which this intention is said to be found, are, I observe, very weak, and general, of an intention merely *in futuro*. Were they even much stronger than they are, they would not be sufficient: something more than mere verbal declaration, some solid fact showing that the party is in the act of withdrawing, has always been held necessary in such cases.' ('The President,' 5 Rob., 279.)

—some solid fact, to show that the party is in the act of carrying that avowed intention into effect. Thus, an American domiciled in the enemy's country had avowed his intention to remove, as was proved by his correspondence ; but, as he had taken no steps in pursuance of that intention, his property was condemned as that of an enemy.¹

Domicil
from resi-
dence

§ 11. Where the party has avowed his intention with respect to residence, and his acts have corresponded with such declaration, the question of domicil is free from embarrassment. But, in most cases, no positive declarations of the party whose domicil is in question can be proved—or, at least, none against his own interests—and it becomes necessary to deduce his intention from the circumstances of his residence, occupation, and business relations. And these circumstances are of so mixed and varied a character as to render it impossible to embrace them all in any general definition. It is proper, however, to mention some of the most prominent of those which have heretofore influenced the decisions of the courts.

Effect of
domestic
ties

§ 12. A most material and significant circumstance in determining the intention of the party, is the residence of his family. If he is married, and established with his family in the country where he is living, the inference is highly reasonable that he intends to reside there permanently. And, although his family may not be with him, if he has made preparations to have them join him, the same inference will be drawn. If he is not a married man, and has no social connections in the country where he is living, the court will look to other circumstances to determine his intentions. In case of double residence, the keeping up of a family *mansion house* has much influence in determining domicil.²

¹ The 'President,' 5 *Rob.*, 277 ; the 'Citto,' 3 *Rob.*, 38 ; the 'Frances,' 8 *Cranch. R.*, 335 ; Westlake, *Private Int. Law*, § 37.

² Phillimore, *Law of Domicil*, §§ 198 et seq. ; the 'Jonge Ruiter,' 1 *Act. R.*, 116 ; Ennis et al. *v.* Smith et al., 14 *How. R.*, 423. The 26 Geo. III. cap. xxx., s. 8, prohibited any subject of his Majesty whose usual residence was in any country not under the dominion of his Majesty, to be the owner in whole or in part of any registered British ship. Under that statute it was held, by Sir William Scott ('The Eleanor Hall,' 1 *Edw.*, 135), that an occasional residence for the purpose of obtaining a colourable qualification would not give a title ; that no person was entitled, who had not his *usual* residence in Great Britain or in the dominions belonging to the Crown, unless he was within some of the exceptions ; that if a man went to another country and there had a more usual residence than in this, he was no longer entitled to the same privileges, and that a person that was continually shifting his residence between the British dominions and the

§ 13. The possession and exercise of political rights,¹ and the payment of taxes, were considered by the Roman law as American States, so as not to have what, under any extension, could be deemed his usual residence in the British dominions, did not come within the description of the statute. (See Abbott on *Shipping*, cap. ii.)

Exercise
of poli-
tical
rights

¹ By the laws of New York no person can hold a civil office or vote at elections who is not a citizen of that State.

During the civil war in the United States, all persons who had voted as State citizens were claimed by the United States Government as liable to the conscription; and the Act of the Congress of March 3, 1863, expressly declared that the levy should include 'all persons of foreign birth who shall have declared on oath their intentions to become citizens.'

Mr. Sellers, a British subject, who had announced his intention to become naturalised, applied, in October, 1862, to be informed whether he could claim the protection of the British Government. He was told that as he had so acted without consulting the British Government, he must not expect that, until a case should arise in which its interference might be requested, it would give any opinion of the view which it might take of such a case. (*Parl. Papers*, 1862.)

In 1862 certain native-born British subjects in Wisconsin claimed that, although they had voted at elections, they had done so under the 'State law as aliens, and had not thereby forfeited their British nationality.' Mr. Seward replied that, so far as the executive authority of the United States was concerned, no foreigner who had not been naturalised, or who had not exercised the right of suffrage, had hitherto been required to serve in the militia.

M. Mercier, the French Minister, wrote in a circular to the French Consuls that Frenchmen who had voted illegally in the United States had no doubt rendered themselves liable to legal penalties in that country, but that they had not forfeited their French nationality, or their right as aliens to be exempt from compulsory military service. And he referred to the laws of some of the States which admit aliens to the exercise of the elective franchise. (*Parl. Papers*, No. 536, 1862.) The matter was referred by Lord Lyons to the Home Government, and he was instructed to abide by the decision of the American Law Courts.

In 1863 certain able-bodied male persons of foreign birth, who had declared on oath *their intention* to become American citizens, were called upon for military duty by the United States. On this the British Government suggested that British subjects who had merely declared their intention to become American citizens, but had not exercised any political franchise, in consequence of such declaration, ought to be allowed a reasonable period after the passing of the Act to exercise the option of leaving the United States, or of continuing residing therein with the annexed conditions. The United States Government thereupon allowed sixty-five days to such persons to exercise their option, and the British Government refused to interfere on behalf of any intended citizens who had not availed themselves of the opportunity. (*Parl. Papers*, No. 337, 1863.)

In 1863, Mr. Mackett, a natural-born British subject, who had not been naturalised, having been arrested in the United States, applied for redress; but it being shown that he had voted at elections, the British Government refused to interfere.

On May 9, 1864, certain instructions were issued by the United States' Secretary of the Navy respecting persons taken in blockade runners, which provided that 'when there is no reason to doubt that those who claim to be foreign subjects are in reality such, they will be

strong tests of domicile ; but less weight seems to be given to these circumstances in England than by the civilians. Nevertheless, when taken in connection with other facts, they are not without their influence in determining national character in war. Sir William Scott, in the case of the 'Dree Gebroeders,' said, that landed estate alone¹ had never been held sufficient to constitute domicile, or fix the national character of the possessor, who is not personally resident upon it ; and Cochin denies that real estate derived from inheritance is any proof of domicile. But, when taken in connection with actual residence, they may be received as proofs of *intention* to remain. So, of the purchase of property, real or personal ; if a man has invested his capital in the country where he resides, in property, or enterprises which would require his personal attention and supervision for a long or indefinite period, or, if he has formed a partnership in business which is to continue for a number of years, the inference usually drawn from these facts is, that he intends to make that place his permanent residence, although no positive declaration to that effect is proved.²

Character
and
extent of
business

§ 14. Another material circumstance by which intention is determined, is the character of the trade, or business, in which the party is engaged. If his commercial enterprises have their origin and centre in the country of his residence, although extending to other countries, or if his business is of such a character and extent as to require an indefinite period to bring it to completion, the fair inference is, that he intends to reside there permanently, and the court will therefore regard it as his domicile.³

required to state under oath that they have never been naturalised in the United States, have never exercised the privileges of a citizen thereof by voting or otherwise, and have never been in the pay or employment of the insurgent or so-called Confederate Government.'

¹ In 1863 the British Government considered that it was not unreasonable for the United States to require military service from those British subjects who had become owners of land by virtue of their declared intention to become American citizens. (*Parl. Papers*, No. 455, 1863.)

² Cochin, *Œuvres*, tome iii. p. 328 ; the 'Dree Gebroeders,' 4 *Rob.*, 235.

³ The 'Vigilantia,' 1 *Rob.*, 15 ; the 'Anna Catharina,' 4 *Rob.*, 118 ; the 'Rendsborg,' 4 *Rob.*, 121.

In 1864, Mr. Jenkins, a British subject, resident in Texas, was told that the British Government could not protect him against the conscription if he persisted in remaining in the Confederate States. (*Parl. Papers*, No. 509.)

§ 15. Another and most significant circumstance by which the intention may be ascertained, is the *time* of residence. In most cases, this circumstance is unavoidably conclusive in determining domicil. Even where the party had first gone to a foreign country for a special purpose, which would repel the presumption that he intended to make it his permanent residence, yet if he has remained a great length of time, it will be presumed that his first intention has been changed, and that a general residence has grown, as is frequently the case, upon a special purpose. Hence, the plea of an original special purpose is not to be averred against a residence continued for a long period of time. If, however, a merchant has gone to a foreign country just before the war, for a special purpose, a fair time should be allowed to him to disengage himself; but if he should continue there during a good part of the war, contributing, by his industry and means, to the strength and security of the enemy, the plea of a special purpose cannot be urged with effect against the rights of hostility.¹

§ 16. In former times the particular situation of America, with respect to distance, was considered by the English courts as entitling the merchants of that country to some favourable distinctions in the matter of domicil, as determined by length of residence. It was, therefore, held that they might remain in an European State for a longer period than a merchant of a neighbouring country, without being considered as a permanent resident. But, with the present facilities for communication afforded by steam and telegraph, it is doubtful if this favourable distinction would be made.

§ 17. The presumption of law with respect to residence in a foreign country, is, that the party is there *animo manendi*, and it lies upon him to explain it. Thus, when the property of a foreigner, who, at the time of its shipment, was living

In 1865, Dr. Benson, a Canadian, applied for protection against being tried by court martial. As it appeared that he was domiciled in Kentucky, and was an army contractor, the British Government refused to interfere. (*Parl. Papers*, No. 106.)

¹ Duer, *On Insurance*, vol. i. p. 498; the 'Harmony,' 2 *Rob.*, 322.

In 1864, Mr. Heslop, a British subject, holding landed property in Virginia, and who had been arrested at Baltimore, having requested British protection, was informed by the British Government that as the circumstances of the case showed Mr. Heslop's active connection with the Confederate Government, it was not a case for interference. (*Parl. Papers*, No. 507.)

in a hostile country, is seized as that of an enemy, the captors are not bound to prove that his place of residence was his actual domicil; but it rests upon him to disprove the presumption of the law, and, to redeem his property from the noxious imputation, he must give such evidence of his intentions and plans as shall be effectual to destroy it.

Evidence
to repel
the pre-
sumption

§ 18. In order to repel this presumption of the law, it is necessary for the party to prove that his original intention was to remain only for a short and definite period, that to accomplish the purpose of his visit, neither a long nor an indefinite period would be required; that his past residence had not been long enough, by the mere operation of time, to establish a domicil, and that he had not been so mixed up with the trade and navigation of the country, as to have acquired its national character, by the very nature of his occupation. The presumption is not repelled by merely showing that his wife and family are still residing in his native country, nor by proving that he contemplates returning to his own country at some future period, or after he has accomplished some particular object. He may have separated himself from his family, or the period of his return may be wholly uncertain and indefinite; or, if definite, it may be after a long interval of time, or his neutral character may have been superseded by his occupation, or by his being so incorporated in the trade or navigation of the country, that its national character is completely fixed upon him. In order to repel this presumption of the law, he must show clearly and conclusively, that such residence in the foreign country has not by the law of domicil, or otherwise, had any effect in changing his national character. This brings us to the examination of the different classes of what is called *necessary* domicil.

Of minis-
ters and
consuls

§ 19. The national character of an ambassador or public minister is not affected by his residence in a foreign country, no matter what may be its duration, or the circumstances indicative of the intent of the party to render it permanent. This results from the rule of ex-territoriality as already discussed. Being deemed a resident within the territory of his own State, the law of foreign domicil does not apply to him. But a consul does not come within this exception; although mere residence in the performance of his official duties may not confer upon him a foreign domicil, nevertheless, his con-

sular character affords no protection to his mercantile adventures. 'If,' says Duer, 'he reside in a belligerent country, his ships and goods are liable to confiscation as those of an enemy, by the hostile belligerent; and they are subject to the same penalty in the country in which he resides, if they be employed in a trade with its public enemies, which is prohibited to its own subjects. Nor, to warrant the confiscation of his property, is it requisite that the consul should bear the character of a general merchant. If the transaction that leads to the seizure is the only commercial speculation in which he is, or ever has been engaged, he is still a merchant, so far as that transaction extends, and must bear the consequences of the character he has assumed. The rule which thus distinguishes between the commercial and the official character of a consul, may sometimes operate in his favour. Where the consul of a belligerent power is engaged as a merchant, in the commerce of a neutral country, in which he resides, his property on the ocean, if employed in a trade strictly neutral, is exempt from hostile capture. His neutral character as a merchant is unaffected by his belligerent character as consul.'¹

§ 20. The French jurists have laid down the following rules respecting the domicil of officers, civil or military, employed in the public service: 1st. If the office be for life, and irrevocable, the domicil of the holder is in the place where its functions are to be discharged, and no proof of the contrary will be admitted, 'for the law will not presume an intention contrary to indispensable duty.' 2nd. If the office be temporary or revocable, the law does not presume that the holder has changed his original domicil, but proof will be admitted to establish the fact that he has done so. These two divisions, says Phillimore, seem to warrant a 3rd. Where the office, although for life and irrevocable, requires the holder to reside only a part of the time in the place where its functions are to be discharged, the law will presume his domicil to be in that place, but this presumption will yield to proof that the seat of his family affairs—the residence of his wife and children—is elsewhere, and that he has described himself, in all legal instruments, as belonging to the place of former

¹ Duer, *On Insurance*, vol. i. pp. 513, 514; the 'Indian Chief,' 3 *Rob.*, 27; the 'Josephine,' 4 *Rob.*, 25; the 'Sarah Christina,' 1 *Rob.*, 239; *Albrecht v. Sussman*, 4 *Ves. and Beams R.*, 323.

domicil, and not to the place of his employment. Thus, in the case of Lord Somerville,¹ the presumption was repelled, and it was held that his parliamentary duties in London, as a peer of Scotland, was no proof that his domicil was there. So, in the case of M. de Courtanel, it was held that the office of Grand Maître des Eaux et Forêts, not requiring a fixed residence, did not prevent the law of original domicil from operating.²

A wife,
minor,
student,
servant

§ 21. It was a maxim of the Roman law, which has been incorporated into modern jurisprudence, that as the wife takes the rank, so does she also take the domicil of her husband ; and, by the same analogy, the widow retains it after her husband's death. But if she marry again, her domicil becomes that of her second husband. The most noted case involving the domicil of the widow, was the disputed succession to the personal estate of Henrietta Maria (widow of Charles I.), who died in France. The betrothed, although in many respects enjoying the privileges of the wife, according to the Roman and civil law, retains the domicil which she had before her betrothment. It is generally considered that a wife divorced, *a mensâ et thoro*, may, after her divorce, choose her own domicil. But not so in case of a mere separation.³ A

¹ What would be the case upon two contemporary and equal domicils, if ever there can be such a case? 'I think,' said the Master of the Rolls, 'such a case can hardly happen ; but it is possible to suppose it. A man born no one knows where, or having had a domicil that he has completely abandoned, might acquire in the same or different countries two domicils at the same instant, and occupy both under exactly the same circumstances ; both country houses, for instance, bought at the same time. It can hardly be said that that of which he took possession first is to prevail. Then suppose he should die at one : shall the death have any effect? I think not, even in that case ; and then *ex necessitate* the *lex loci rei sitæ* must prevail ; for the country, in which the property is, would not let it go out of that, until they knew by what rule it is to be distributed. If it was in this country, they would not give it until it was proved that he had a domicil somewhere.' (Somerville *v.* Somerville, 5 *Ves.*, 749.)

² Phillimore, *Law of Domicil*, §§ 113 et seq. ; Denisart, *Domicile*, ch. ii. § 5 ; Duranton, *Droit Français*, liv. i. tit. iii. ; Somerville *v.* Somerville, 5 *Vesey R.*, 757.

³ In 1862, it was decided by the British Government, in the case of American-born widows of British subjects, that, if the American law was at variance with their own (conferring upon the wives of British subjects the privileges of natural-born British subjects), and the United States desired to put the American law in force, the American law must prevail, and American-born widows being resident in America would not be entitled to a certificate of being British subjects. The British Government further decided in the case of British-born subjects the widows of

minor, who is not *sui juris*, cannot change his domicil of his own accord (*proprio motu*) ; his domicil is that of the father, or of the mother during widowhood, or, perhaps in some cases, of the legally appointed guardian. With respect to the question of *succession* to an intestacy, some writers contend that neither the mother nor the guardian can change the domicil of a minor whose father is deceased, while others hold the contrary doctrine ; all, however, agree that the *forum* of the minor is that of the surviving parent or legal guardian.¹

American or foreign husbands, that if after the dissolution of their coverture they should elect to claim the benefit of their British character, they would be at liberty to do so, and must be treated and protected as British subjects. (*Parl. Papers*, No. 189.)

According to the French law, a woman legally separated from her husband recovers the right to a separate domicil.

It was held in England that a woman living abroad and apart from her husband, but not legally separated, had not a separate domicil. (Re Daly's Settlement, 22 *Jurist*, 525.)

¹ The British Government decided that minors who were born in British dominions, but whose fathers had become naturalised American citizens, ought, during their minority, to be considered and treated as between the two Governments, not as British subjects, but as American citizens, and that they must continue to be so considered if after attaining their majority they had continued to remain domiciled in the United States, and had not taken any active steps to absolve themselves from their allegiance to that country. (*Parl. Papers*, N. America, 1861-2.)

A son was born in England, of a British father subsequently naturalised in the United States ; the son attained his majority at Baltimore, according to the *lex loci*, but had not exercised the rights of a citizen. With respect to this case, the British Government decided in 1863, that as a minor child follows the domicil of the father, and as the father was naturalised by the law of the United States, and the son after attaining majority had continued his domicil in, and was considered as naturalised by the law of, the United States, he must be considered as a naturalised American citizen, and not entitled to claim, as against the Government of the United States, the protection of the British Government. A son attained his majority at Philadelphia in the United States, being born there of a British father, living in the United States but not naturalised : neither father nor son had made any declaration of intention to become citizens. In 1863, the British Government decided that it could not insist, as against the United States' Government, that such a person should be considered as a British subject, and exempt from the liabilities incident to the status of a United States' citizen.

'The father of Joseph Celt, and his wife, who was *enceinte*, inhabiting Calais when it was taken by the French, fled into Flanders, and there the woman was delivered of the said Joseph ; and it was adjudged that he shall be entitled to the privileges of a natural-born British subject, under the Act 25 Edward III., because the parents were born in Calais, and he himself was begotten there, though born in Flanders' (Chitty, *Comm. Law*, vol. i. 118). However, Lord Coke states that 'the time of his birth is of the essence of a subject born,' so that it is unnecessary to go back beyond that period to decide a subject's allegiance. In 1864, in the case of one Cole, it was decided by Great Britain that the children of American citizens born in British territory, but being in American

The domicil of an illegitimate minor is that of the mother. Students, whether majors or minors, are not considered as acquiring a domicil in the place where they sojourn merely for the purpose of prosecuting their studies. Servants may, or may not, have the same domicil as their masters, according to the particular circumstances of the case.¹

A soldier,
prisoner,
exile, and
fugitive

§ 22. According to the Roman law, a soldier's domicil was in the country where he served, if he possessed nothing in his own country ; but if he had any property in his own country, he would be allowed a double domicil.² The leading modern case on this point is that of the Duke of Guise, who contracted a marriage while in the service of the King of Spain and the Emperor of Austria, during his residence at Brussels. The validity of this marriage depended upon his domicil at the time it was contracted. By the law of all European countries, the prisoner preserves the domicil of his country. This principle is applied to the continued residence of a merchant in a foreign country. If such residence in a hostile country during a war is not voluntary, but proceeds from compulsory restraint imposed by the enemy, and his intention to leave is clearly manifested by overt acts previous to the capture of his property, it has been decided that such violent detention will not prevent its restoration. The same reasoning applies to a neutral merchant domiciled in a hostile country before the war. With respect to exiles, the civil jurists distinguish between banishment for life, and for a term of years ; in the first, the exile loses his original domicil, but preserves it in the second, being regarded in the same light as a person on a long voyage. The fugitive or emigrant from his country on account of civil war, is held not to have lost his intention of returning to it, and, therefore, retains his native domicil. But if the prisoner, exile, or fugitive continue to reside in a

territory, could not claim the protection of the British Government to exempt them from American military service (*Parl. Papers*, No. 200).

¹ Merlin, *Répertoire*, verb. 'Domicile,' § 5 ; Justinian, *Dig.*, 50, 1, 37 ; *Code* xii. 1, 13 ; x. 40, 9 ; *Donnegal v. Donnegal*, 1 *Addams R.*, p. 5 ; *Whitcombe v. Whitcombe*, 2 *Curt R.*, 352 ; *Gambier v. Gambier*, 7 *Sim. R.*, 263 ; *Guyer v. O'Daniel*, 1 *Binn. R.*, 349 ; *School Directors v. James*, 2 *Watts and Serg. R.*, 568 ; *Freetown v. Taunton*, 16 *Mass. R.*, 51 ; *Scrimshire v. Scrimshire*, 2 *Hagg. R.*, 405 ; *Granby v. Amherst*, 7 *Mass. R.*, 1 ; *Putnam v. Johnson*, 10 *Mass. R.*, 498.

² The domicil of an English officer, serving his country abroad, is in England. (*Re Phipps*, 2 *Curt. Eccles. R.*, 368 ; *Whyte v. Repton*, 3 *ibid.*, 818 ; *Hodgson v. De Beauchesne*, 12 *Moore, P. C. R.*, 285.)

foreign country after the coercion has been withdrawn, and after his power of choice has been restored, he may acquire a domicile therein.¹

§ 23. Suppose the government of the country of residence prohibits a foreigner from acquiring a domicile. It has been decided in France that a *de facto* domicile may be acquired, notwithstanding such prohibition, even with respect to the country of residence. This is placed on the ground that, although not entitled to the privileges of a domiciled subject, he may incur the liabilities. Again, suppose the government of a country forbade its subjects to establish a domicile out of their native land, may they not acquire a *de facto* foreign domicile? Undoubtedly they may, so far as respects their national character in war, and Phillimore is of opinion that the personal property of such subjects who have established a *de facto* domicile in a foreign country, must be distributed according to the law of the *de facto* domicile. He, however, admits that the case would be open to some argument on the other side.²

Effect of
municipal
laws on
domicil

§ 24. Treaties sometimes have the effect of preserving to the resident in a foreign country his original domicile, or of giving to him a commercial domicile, neither of the country of his origin nor that of his residence. Such has been the general effect of the treaties and commercial intercourse between Christian and Mohammedan States. In the Turkish dominions the control over and disposal of their property, its exemption from municipal laws, and other privileges, have been secured to Christians by treaty stipulations. In such cases, the domicile of their own countries is considered as preserved to foreign residents in the East, the ordinary rules of the international law of domicile not being applicable to such residence. In general, European and American merchants residing in the East under the protection of trading factories, are considered as retaining the national character of the factory to which they belong. This distinction results from the nature and habits of the East, foreigners not being permitted to mix freely with the native inhabitants, or to become incorporated into the mass of society. They, therefore, always continue to be strangers and mere

Of trea-
ties

¹ Justinian, *Dig.* l. t. i. l. xxiii.; Westlake, *Private Int. Law*, §§ 52, 53.

² Phillimore, *Law of Domicil*, §§ 301-306.

sojourners, no matter what may be the circumstances, or length of time, of their residence. As they cannot acquire the national character of the country where they reside, the law very properly considers them to have retained that of the country to which they belong. But this doctrine does not apply to Christian countries. An attempt was at one time made to extend it to British merchants residing in Portugal, with special privileges which distinguished them from the native inhabitants, and from all foreigners of other countries; but the courts held, that the law of domicil of Europeans residing in the East was wholly inapplicable to such cases.¹

Tempo-
rary
residence

§ 25. If a neutral merchant go into an enemy's country during the war merely to collect his debts, or to withdraw the property which he may have there, his temporary residence, *for that purpose alone*, will not confer upon him a hostile character, and the property and funds thus sought to be withdrawn will not be subject to confiscation. But he must bring himself clearly within the rule, for, if instead of confining himself to the legitimate object of his visit, he engages in a trade purely national, his character with respect to such trade is regarded as hostile, and the property embarked in it, if captured, is condemned. It is contended by some that a neutral merchant residing in the enemy's country at the commencement of the war, should have the same privilege of withdrawing his property, and that, for a reasonable time, it should be exempt from capture. But this doctrine has not been established by the positive adjudication of any court of prize.²

A mer-
chant
may have
several
domicils

§ 26. The active spirit of commerce and enterprise in the present day, and the increased facilities for travel afforded by steam navigation and railroads, are well calculated to perplex the mind of a court in assigning accurately a merchant's national character, at different periods of a divided transaction. Thus, if he have charge of a complex mercantile business, he may be found, at no great intervals of time, in a variety of local situations, without any permanent residence in any one place. It is, therefore, held, that a merchant carrying on commerce in different countries, in time of war, has the national character of each, in his respective trades. This agrees with

¹ The 'Indian Chief,' 3 Rob., 29; the 'Twee Frienden,' &c., 3 Rob., 29; Ruding v. Smith, 2 Hagg. R., 386; Moore v. Darell and Budd, 3 Hagg. R., 350; Maltass v. Maltass, 3 Rob., 81.

² See *post.*, vol. ii. ch. xxiii. § 6.

the maxim of the Roman law, that when a man has so set up his household goods in two different places as to be equally established in both, both are to be regarded as his domicile. It, however, was remarked by Domat (and this opinion was adopted by other jurists) that although a man may have two or more domicils for particular purposes, yet it would be very difficult, if not impossible, for him to have two which should be equally the centre of his affairs. Hence municipal law, both in Europe and America, requires the characteristics of a *principal* domicile for cases of a testament, or a distribution under intestacy, while it permits the same person, at the same time, to have other domicils for certain purposes, and with respect to particular rights and property.¹

§ 27. The native national character, lost, or suspended by a foreign domicile, easily reverts.² The adventitious character imposed by domicile ceases with the residence from which it arose. An actual return to his native country is not always necessary, nor even an actual departure from the country of

Native
character
easily
reverts

¹ Domat, *Traité des Lois*, liv. i. tit. xvi. § 6; Merlin, *Répertoire*, tit. viii. 'Domicile,' § 7.

² In 1863 a Mr. Scott applied to the British Consul at New York for protection. He had declared his intention to become a citizen of the United States at the time of the Trent affair, and if war had broken out it was his intention to adhere to the United States, against his own sovereign. The British Government refused to interfere. In 1863 Mr. Hamilton, an Irish gentleman, who had been naturalised in the United States, and who had returned to Ireland, being about to go back to the United States, requested to know whether he could resume his British nationality previously to doing so, and was told that the British Government could not promise to afford him protection against any obligations which the laws of the United States might impose upon persons who had been naturalised in that country. In 1862 the British Government decided that a natural-born British subject, who had been naturalised in the United States, would not be recognised by the British Government within the United States as a British subject, but if he returned to British territory his native allegiance would revert. In the event of the independence of the Confederate States being established, the British Government would not have interfered on behalf of such naturalised Americans, and their status would have been left to be determined by the Government of those States. Naturalised citizens would have had a right to claim from the United States to be treated, with regard to a transfer of allegiance, in the same manner as native citizens. Until, however, the independence of the Confederate States was recognised, the United States were justified in enforcing against all persons resident therein, the obligations of the oath of allegiance which they had taken. If the Confederate States had become independent, the British Government was not bound, nor were the Confederate States, to recognise such persons as British subjects, nor would their return to Great Britain and renunciation there of their United States' allegiance have made any difference in this respect. (*Parl. Papers, N. Amer.*, 1861-62.)

his domicil, if he has actually put himself in motion *bona fide* to quit the country *sine animo revertendi*. But the commencement of the journey to return to his native country, although it may restore to the party his native national character, will not exempt his property from the hostile character acquired by residence, only in cases where such property has been engaged in a trade completely lawful in the native character. The principle can never be extended to protect a trade which is illegal in a native subject or citizen. Thus, an American citizen, domiciled in England previous to the war between the two countries, shipped goods from that country a long time after the commencement of the war, and accompanied the shipment in person, with the intention of abandoning his English domicil, and resuming his American character. But his property was captured and condemned by an American prize court, on the ground that whether an English subject, or an American citizen his property was liable to confiscation—if the former, as that of an enemy; and if the latter, as that of a citizen unlawfully trading with an enemy. The mere return of a party, whether a belligerent subject or a neutral, to his native country, is not sufficient, of itself, to restore his native character. If he merely returns for a visit, or temporary purpose, and designs to resume his former residence, the character impressed on him by his foreign domicil remains unchanged. In other words, his domicil, once established, is not broken by a temporary change of residence, and his property on the ocean, although shipped or captured during his absence, remains liable to confiscation.

Leaving
and re-
turning
to native
country

§ 28. In the application of the general rule that the native character of the party must be taken from that of the country where he resides, there is a material difference between removing from, and returning to, one's native country. Although the native character remains till a new domicil is acquired by actual residence or settlement in a foreign country, the adventitious character resulting from domicil ceases with the residence from which it arose. But, according to the decisions of the courts of the United States, it is not sufficient to prove the mere intention of the party to return to his native country for the purpose of remaining there permanently; he must have actually commenced to return. The British courts, however, have, in some cases, considered other overt acts, when

performed in good faith, as sufficient to restore the native national character.

§ 29. It seems to be a well-settled principle of international law that, during the existence of hostilities (*flagrante bello*), no subject of a belligerent can transfer his allegiance or acquire a foreign domicile by emigration from his own country, so as to protect his trade either against the belligerent claims of his own country, or against those of a hostile power. In other words, his allegiance continues the same, and his native character is unaffected by his change of residence. This doctrine rests on the ground that to desert one's own country in time of war, is an act of criminality, and that if a citizen removed to another State, his allegiance is still due to his sovereign, and he is as much bound to abstain from trade with a public enemy as if he had remained at home; and his property, as that of an enemy, continues to be just as liable to seizure and confiscation, by an opposite belligerent. This principle is sanctioned by the most approved writers on international law, and has been expressly affirmed by the courts of the United States. The doctrine above announced is not in conflict with that contended for by some writers, that a citizen has a general right of expatriation in time of peace, and that the assent of his government to seek change of allegiance and national character is implied in the absence of any prohibition. Nor is it to be construed as denying to a citizen the right to change his allegiance and national character in time of war, with the express consent of the State, and with authentic renunciation of pre-existing citizenship. But expatriation, in time of war, does not result from a change of residence, and the general consent of the State to emigration, which is presumed, in time of peace, from the absence of any general prohibition. If so, it might be appealed to as a mask to cover desertion, or treasonable aid to the public enemy.¹

Subjects
of a belli-
gerent
during
war

§ 30. Mere military occupation of a territory by the forces of a belligerent (without confirmation of conquest by one of the modes recognised in international law), does not, in gene-

Effect of
military
occupa-
tion

¹ The 'Dos Hermanos,' 2 *Wheat. R.*, 98; Talbot *v.* Janson, 3 *Dallas R.*, 162; the 'Santissima Trinidad,' 7 *Wheat. R.*, 284; Duguet *v.* Rhineland, 1 *Johns. Cas.*, 360; Jackson *v.* N. Y. Ins. Co., 2 *Johns. Cas.*, 191; United States *v.* Williams, 2 *Cranch. R.*, 82, note; Murray *v.* the 'Charming Betsy,' 2 *Cranch. R.*, 64.

ral, change the national character of the inhabitants. It will be shown in a subsequent chapter, that the allegiance of such inhabitants is temporarily suspended, but not actually transferred to the conqueror. They owe to such military occupants certain duties, but these fall far short of a change of the allegiance due to their former sovereign. But if the military occupation be by a power in amity with the former sovereign, and has taken place with the evident concurrence of those acting under his authority, a prior and former cession is presumed. The national character of the inhabitants is therefore deemed to be changed by the presumed transfer of their allegiance. Thus, the occupation of the Ionian republic by French troops, by the voluntary surrender of the Russian authorities, then at peace with France, was deemed sufficient to repel the supposition that such occupation was hostile and temporary, and therefore sufficient to raise the presumption of a formal cession, although none was proved. So of the inhabitants of territory in the possession and under the government of the conqueror prior to cession or complete conquest, for every commercial and belligerent purpose they are considered by other countries as subjects of the conqueror, notwithstanding that he himself may regard them as aliens with respect to the inhabitants of his other dominions. Upon this point, however, there are conflicting decisions, belligerents having sometimes regarded territory in the military occupation of their enemy as friendly, and sometimes as hostile, according to their own interests and the peculiar circumstances of the case. If the sovereign power of the State choose to permit a continuance of commerce with them, the courts of the same State will regard them as friendly, and *vice versa*.¹

¹ The 'Roletta,' *Edw. R.*, 171; *Benson v. Boyle*, 9 *Cranch. R.*, 191; *Hagedorn v. Bell*, 1 *M. and Sel. R.*, 450.

A temporary occupation of a territory by an enemy's force does not of itself necessarily convert the territory so occupied into hostile territory, or its inhabitants into enemies; this was clearly shown in the case of the 'Gerasimo.' At the time of her capture this ship was bound to Trieste with a cargo of Indian corn, which she had taken on board at Galatz. She was sailing under Wallachian colours, and on July 19, 1854, during the prosecution of her voyage, was captured as she was coming out of the Sulina mouth of the Danube, by H.M.S. 'Vesuvius,' under the command of Captain Powell. The captors appear to have taken none of the usual steps for obtaining adjudication until they were stimulated to action by the owners of the cargo, who in June 1855 brought their claim into the High Court of Admiralty, claiming the cargo, and demanding restitution with

§ 31. It will also be shown hereafter that, where the conquest is confirmed, or in any other way made complete, the Of complete conquest

costs and damages. At the same time they issued a monition requiring the captors to proceed to adjudication. The captors proceeded accordingly, and in that year (and again in 1856, upon further proof) the case was heard, but the judge condemned the cargo, adding that he should have experienced very great difficulty in coming to the conclusion that the claimants had proved their property in the cargo even if they were entitled to any *persona standi* in the court.

The following contains the chief points of the judgment delivered by the Lords of the Privy Council, on the appeal:—Upon the appeal, the first question is, whether the owners of the cargo, in regard to this claim, are to be considered as alien enemies; and for this purpose it will be necessary to examine carefully both the principles of law which are to govern the case, and the nature of the possession which the Russians held of Moldavia at the time of this shipment. Upon the general principles of law, applicable to this subject, there can be no dispute. The national character of a trader is to be decided, for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purpose of the trade, as a subject of the Power under whose dominion he carries it on, and, of course, as an enemy of those with whom that Power is at war. Nothing can be more just than this principle; but the whole foundation of it is, that the country in which the merchant trades is enemy's country. Now the question is, what are the circumstances necessary to convert friendly or neutral territory into enemy's territory? For this purpose, is it sufficient that the territory in question should be occupied by a hostile force, and subjected, during its occupation, to the control of the hostile Power, so far as such Power may think fit to exercise control? or, is it necessary that, either by cession or conquest, or some other means, it should, either permanently or temporarily, be incorporated with, and form part of, the dominions of the invader at the time when the question of national character arises? It appears to their Lordships that the first proposition cannot be maintained. With respect to the meaning of the term 'dominions of the enemy,' and what is necessary to constitute dominion, Lord Stowell has in several cases expressed his opinion. In the case of the 'Fama' (5 Rob., 115) he lays it down that, in order to complete the right of property, there must be both right to the thing and possession of it; both *jus ad rem* and *jus in re*. 'This,' he observes, 'is the general law of property, and applies, I conceive, no less to the "right of territory" than to other rights. Even in newly discovered countries when a title is meant to be established for the first time, some act of possession is usually done, and proclaimed as a notification of the fact. In transfer, surely, when the former rights of others are to be superseded and extinguished, it cannot be less necessary that such a change should be indicated by some public act, that all who are deeply interested in the event as the inhabitants of such settlements may be informed under whose dominion and under what law they are to live.' The importance of this doctrine will appear when the facts with respect to the occupation of the Principalities come to be examined. That the national character of a place is not changed by the mere circumstance that it is in the possession and under the control of a hostile force, is a principle held to be of such importance that it was acted upon by the Lords of Appeal in 1808, in the St. Domingo cases of the 'Dart' and 'Happy Couple,' when the rule operated with extreme hardship. In the

allegiance of the inhabitants who remain in the conquered territory is transferred to the new sovereign. The same effect

case of the 'Manilla' (1 *Edw.*, 3) Lord Stowell gives the following account of those decisions :—'Several parts of it [the island of St. Domingo] had been in the actual possession of insurgent negroes, who had detached them as far as actual occupancy could do from the mother country of France and its authority, and maintained within those parts, at least, an independent government of their own. And although this new power had not been directly and formally recognised by any express treaty, the British Government had shown a favourable disposition towards it, on the ground of its common opposition to France, and seemed to tolerate an intercourse that carried with it a pacific and even friendly complexion. It was contended, therefore, that St. Domingo could not be considered as a colony of the enemy. The Court of Appeal, however, decided, though after long deliberation, and with much expressed reluctance, that nothing had been declared or done by the British Government that could authorise a British tribunal to consider this island generally, or part of it (notwithstanding a Power hostile to France had established itself within it, to that degree of force and with that kind of allowance from some other States), as being other than still a colony, or part of a colony, of the enemy. There can be no doubt that the strict principle of that decision was correct.' On the other hand, when places in a friendly country have been seized by and are in possession of the enemy, the same doctrine has been held. While Spain was in the occupation of France, and at war with Great Britain, the Spanish insurrection broke out, and the British Government issued a proclamation that all hostilities against Spain should immediately cease. Great part of Spain, however, was still occupied by the French troops, and, amongst others, the port of St. Andero. A ship called the 'Santa Anna' was captured on a voyage, as it was alleged, to St. Andero, and Lord Stowell (1 *Edw.*, 182) observed : 'Under these public declarations of the State, establishing this general peace and amity, I do not know that it would be in the power of the Court to condemn Spanish property, though belonging to persons resident in those parts of Spain which are at the present moment under French control, except under circumstances which would justify the confiscation of neutral property.' The same principle has been acted upon in the Courts of Common Law. In the case of *Donaldson v. Thompson* (1 *Campb. N.P.R.*, 429), the Russian troops were in possession of Corfu and the other Ionian Islands, though the form of a Republic was preserved, and it was contended that the islands must be considered as substantially part of the territory of the Russian Empire if the Russian power was there dominant, and the supreme authority was in the Russian commander ; or, if not, that the Republic must be considered as a co-belligerent with Russia against the Porte, since the Emperor of Russia derived the same advantages, in a military point of view, from this occupation of the islands as if he had seized it hostilely, or the Ionian Republic had been his ally in the war he was carrying on. Both these propositions, however, were repudiated by Lord Ellenborough, and afterwards, on a motion to set aside the verdict, by the Court of King's Bench, Lord Ellenborough observed, 'Will anyone contend that a Government which is obliged to yield in any quarter to superior force becomes a co-belligerent with the Power to which it yields? It may as well be contended that neutral and belligerent mean the same thing.'

The same doctrine was afterwards laid down by the Court of King's Bench, in the case of *Hagedorn v. Bell* (1 *Maule and Sel.*, 450), in the case of a trade carried on with Hamburg, which had been for several years, and at the time was, in the military occupation of the French. The

is produced by an ordinary cession of such territory. In either case the national character of the inhabitants who remain, is deemed to be changed from that of the former to the new sovereign, and in their relations with other nations they are entitled to all the advantages, and are subject to all the disadvantages, of their new international *status*.

§ 32. But mere cession by treaty does not of itself operate as an immediate transfer of the allegiance of the inhabitants

Of cession
without
occupa-
tion

distinction between hostile occupation and possession clothed with a legal right by cession or conquest, or confirmed by length of time, is recognised by Lord Stowell, in the case of the 'Boletta' (1 *Edw.*, 171). A question there arose whether certain property belonging to merchants at Zante, which had been captured by a British privateer, was to be considered as French or as Russian; that question depending upon the national character of Zante at the time of the capture. Lord Stowell observes (p. 173): 'On the part of the Crown it has been contended that the possession taken by the French was of a forcible and temporary nature, and that such a possession does not change the national character of the country until it is confirmed by a formal cession or by a long lapse of time. That may be true, when possession has been taken by force of arms and by violence; but this is not an occupation of that nature. France and Russia had settled their differences by the peace of Tilsit, and the two countries being at peace with each other, it must be understood to have been a voluntary surrender of the territory on the part of Russia.' On this ground he held the territory to have become French territory, remarking, in a subsequent passage of his judgment, that this was a cession by treaty, and not a hostile occupation by force of arms, liable to be lost the next day. These authorities, with the other cases cited at the bar, seem to establish the proposition that the mere possession of a territory by an enemy's force does not of itself necessarily convert the territory so occupied into hostile territory, or its inhabitants into enemies. From the nature of the possession of Moldavia by the Russians, at the time when the shipment in question was made, it seems impossible to hold that, by means of an occupation so taken, so continued, and so terminated, Moldavia ever became part of the dominions of Russia, and its inhabitants subjects of Russia and, therefore, enemies of those with whom Russia was at war. The utmost to which the occupation could be held to amount was a temporary suspension of the *suzeraineté* of the Porte, and a temporary assumption of that *suzeraineté* by Russia; but the national character of the country remained unaltered, and any intention to alter it was disclaimed by Russia. At what period, then, could foreigners dwelling there be said to have that notice of a change in the dominion and in the laws under which they were to live, to which Lord Stowell refers in the case of the 'Fama'? At what period were they under the obligation of changing their domicil in it, under the penalty, if they omitted to do so, of being treated as enemies of Great Britain? Moldavia and Wallachia were not treated by the Porte as enemies, and it would be singular if these countries, though not held to be enemies by Turkey, should be held to be enemies of the allies of Turkey. That the Wallachian flag was recognised, both by the Russian and Turkish authorities, sufficiently appears from the documents before the court; and their Lordships have ascertained, by communication with the Foreign Office, the other facts above stated; and, further, that no act was ever done by the British Government to change the national character of the Provinces in relation to Great Britain; and without some such act the occupation

of the ceded territory. They remain subjects of the power to which their allegiance was originally due, until the solemn delivery of the possession by the ceding State, and an assumption of the government by that to which the cession is made. The actual delivery of the possession and the actual exercise of the powers of government must be clearly shown. In a case of capture of property belonging to a merchant of New Orleans, after the cession of Louisiana by Spain to France, which, if the owner was a French subject, was hostile, and, if a Spanish subject, was neutral, Sir William Scott decreed the restoration, on the ground that the evidence of any actual delivery of the territory to any French authority, was insufficient and unsatisfactory.¹

Of revolution
and insurrec-
tion

§ 33. Revolution or possession by insurgents, as already stated, cannot be regarded by a prize court as changing the national character of the territory so possessed or occupied, until the fact has been recognised by the political authority of the government to which the court belongs. Thus, although it was a matter of notoriety that a considerable part of the island of St. Domingo had, by revolt, been detached from the French colonial government, and its inhabitants were in common opposition to France, then at war with England, the court of appeal, nevertheless, decided that such inhabitants must be regarded as hostile in their commercial relations, till the British Government should recognise their change of national character. But where any port or part of the island had been recognised by orders in council as not in the possession and under the dominion of France, such port or place would be so considered by the court. The supreme court of the United States has adopted the same rule of decision.²

Of a par-
ticular
trade

§ 34. In many cases, the nature of the traffic or business in which an individual is engaged, may stamp upon him a

by the Russians, under the circumstances stated, could not produce such an effect. Being of opinion that the claimant had a *persona standi* in the Court, their Lordships considered the effect of the evidence upon further proof, and advised restitution of the cargo and damages against the captors.—The ‘Gerasimo,’ 11 *Moore, P. C. R.*, 88.

¹ The ‘Fama,’ 5 *Rob.*, 106.

² The ‘Manilla,’ 1 *Edw. R.*, 1; the ‘Pelican,’ 1 *Edw. R.*, app. D.; *Yrisarri v. Clement*, 3 *Bing. R.*, 432; *Johnson v. Greaves*, 2 *Taunt. R.*, 344; *Blackburne v. Thompson*, 3 *Comp. R.*, 61; *Hoyt v. Gelston*, 3 *Wheat. R.*, 324, note; *Kennett v. Chambers*, 14 *How. R.*, 38.

national character, wholly independent of that which his place of residence alone would impose. Thus, although a neutral merchant, residing in his own country, and trading, in the ordinary manner, to the country of a belligerent, does not thereby acquire a hostile character, yet, if he is a privileged trader, engaged in a commerce that none but the subjects of the enemy are permitted to conduct, or that can only be carried on by a special license from the government, the place of his domicil will not protect such trade, but all his property embarked in it becomes liable to confiscation, as that of an enemy. So, also, if the neutral merchant has a house of trade in the hostile country, either as a partner, or on his sole account, all the commerce of such house is regarded as essentially hostile, and all his property engaged in it is liable to condemnation. The effect of the traffic in which a neutral vessel is engaged upon the national character of the owner, so far as such property is concerned, is fully discussed by Mr. Duer.¹

§ 35. There is, however, a very material distinction between the hostile character impressed by domicil, and that which results solely from the nature of the traffic in which the individual is engaged. A foreign merchant domiciled in the country of the enemy, is himself an enemy, in the same sense and to the same extent as a native subject; and all his property on the ocean, wherever it may be found, and whatever may be the nature of the commerce in which it is embarked, is liable to confiscation. But the hostile character which arises solely from the nature of the traffic, is limited, in its noxious and penal effects, to the transactions and property that the prohibited trade embraces; in all other respects, such individual still retains all the rights and immunities of a neutral, a subject, or an ally, as the case may be.²

§ 36. The habitual employment of an individual may also affect his national character. Thus, a person employed habitually and constantly, as a master or mariner, or as a supercargo or commercial agent, in the trade and navigation of a hostile country, although he has no domicil there, in the civil and legal sense of the term, is impressed with its national

¹ Duer, *On Insurance*, vol. i. pp. 523-577.

² The 'Anna Catharina,' 4 *Rob.*, 119; the 'Freundschaft,' 4 *Wheat. R.*, 107; the 'San Jose Indiano,' 2 *Gallis. R.*, 268.

character, and this hostile character spreads itself, in its consequences, *generally* over his affairs. It follows and involves all his property, in whatever trade employed, that does not appear, from other circumstances, to have acquired a distinct national character. In order to redeem it from confiscation on this ground, the burthen of proof is cast upon him. The principle seems founded in reason; for persons so employed are as much incorporated with the commerce of the hostile country, as persons who have their permanent residence in the enemy's territory.¹

National
character
of ships
and goods

§ 37. The national character of ships is, as a general rule, determined by that of their owners.² But, as hereafter shown, this rule is subject to many exceptions, a hostile character being not unfrequently impressed upon the vessel, while its owners are neutrals or friends. Thus, a hostile flag and pass, the carrying of military persons or despatches of an enemy, trading between enemy's ports, &c., will give to the vessel a hostile character, no matter what may be that of its owners. The national character of goods, as a general rule, follows that of their owner, but, as shown in the subsequent chapters, this rule is sometimes varied by the character and conduct of the vessel in which they are found, by the acts of the commander or supercargo in whose hands they have been placed, and by the nature of the documentary evidence by which the ownership is attempted to be proved. The origin, nature and destination of the goods themselves are sometimes conclusive of their national character, whatever may be that of their proprietor. Thus, where the goods are the produce of an estate or plantation in an enemy's territory or colony, the soil impresses upon them a hostile character, although the owner may be a neutral, and resident in a neutral country. Although his general national character may be neutral or friendly, he is considered an enemy, with respect to that particular produce, which, therefore, in its course of transportation to another country, is liable to capture as enemy's property. The rule

¹ In Captain Sherwin's case, the United States pleaded that his nationality was proved by his having commanded a United States' ship, which only United States' citizens could do. (*Parl. Papers*, No. 612, 1863.)

It was decided in *Guier v. O'Daniel* (1 *Binn.*, 349) that the domicil of a seafaring man, without a known domicil, is the domicil of origin. See also Foelix, *Droit Inter. Priv.* l. i. t. i. § 29.

² See the case of the 'Huascar,' *post.*, ch. xiii. § 8.

applies even where such produce has been shipped in time of peace. The other questions will be discussed in subsequent chapters.¹

¹ Phillimore, *On Int. Law*, vol. iii. §§ 485, 487; the 'Phoenix,' 5 *Rob.*, 25; the 'Vigilantia,' 1 *Rob.*, 13; *Benton v. Boyle*, 9 *Cranch. R.*, 191; the 'Herstelder,' 1 *Rob.*, 115; the 'Packet de Bilboa,' 2 *Rob.*, 133; see *post.*, vol. ii. ch. xxii. et seq. For the evidence of registry of a British ship, see 17 and 18 Vict., c. 104, s. 107, and 39 and 40 Vict., c. 80, ss. 36, 37. In cases of slave seizures the flag carried by the slave-ship does not fix the nationality of the vessel. (The 'Eagle,' 1 *W. Rob.*, 246.)

CHAPTER XIII

MUTUAL DUTIES OF STATES

1. All international rights have their corresponding duties—2. Classification of the duties of States—3. Duties corresponding to perfect rights—4. State responsible for acts of its rulers—5. Acts of subordinate officers—6. Acts of private citizens—7. Piracy by sea and land—8. Definition of piracy—9. Pretended emigration and expatriation—10. Duties of mutual respect—11. Failure in respect not always an insult—12. Right to trade—13. Mutual duty of commerce—14. Declining commercial intercourse—15. Prohibition of China and Japan—16. Imperfect duties—17. Duty of mutual assistance—18. In case of famine—19. In case of floods, fires, &c.—20. For the preservation of others—21. Duties of humanity—22. Offices of humanity may be asked but not required—23. Practice of quarantine—24. Each one to determine whether it will grant them—25. Right to expel foreigners—26. Duty of international friendship.

Rights
and corre-
lative
duties

§ 1. HAVING discussed the general rights of sovereign and independent States, with respect to their relations with each other, it is proposed here to consider briefly the duties resulting from, or corresponding to, such rights. Every right has its correlative duty. As the international rights of States are divided into *perfect* and *imperfect rights*, so the corresponding international obligations may be also divided into *perfect* and *imperfect duties*. It will be remembered that any right of a sovereign State is none the less a right because it is classed as imperfect in international jurisprudence, or because it cannot be absolutely demanded and enforced under the positive law of nations ; so, the corresponding obligation, although imperfect, is, nevertheless, a duty binding upon the conscience of the nation which owes it. Some writers have objected to the use of the terms *imperfect* rights and *imperfect* duties, considering all rights as *perfect*, or *stricti juris*, and their corresponding duties as *absolute* ; while what Vattel calls imperfect rights and duties are classed as usages of comity—*comitas gentium*,—or laws of convenience—*droit de convenance*. The distinctions made by Vattel are well founded, and his terms, although perhaps not well chosen, are now thoroughly incor-

porated into the technical vocabulary of international science, and their meaning is well understood.¹

§ 2. In discussing the mutual duties of States, we will consider : *First*, those *perfect* duties which one State is absolutely bound to perform, and which others have a perfect right to demand, such as the obligations to render justice to others, and to permit to them the enjoyment of the rights of independence, of quality, of property, of legislation and jurisdiction, of legation and treaty, &c. ; *second*, those *imperfect* duties which are recognised by international jurisprudence as binding obligations, but which those to whom they are due cannot claim and enforce as absolute rights, such as the ordinary duties of comity, of diplomatic and commercial intercourse, &c. ; and *third*, those *imperfect* duties which rest solely upon the law of nature, and are not taken cognisance of by the positive law of nations, such as the offices of humanity, of friendships, of reciprocal kindness, &c.

§ 3. The obligation of a State to render justice to all others is a *perfect* obligation, of strictly binding force, at all times and under all circumstances. No State can relieve itself from this obligation, under any pretext whatever. It is an obligation, according to Vattel, 'more necessary still between nations than between individuals ; because injustice has more terrible consequences in the quarrels of these powerful bodies politic, and it is more difficult to obtain redress.' The same rule applies to all the duties of a State which result from the *perfect* international rights of others, for whatever one nation has a perfect right to demand of another, that other is absolutely bound to render. The rule is absolute, and cannot be evaded under any technicality, sophistry, or other pretext. Whatever one State can claim as its perfect right, it is the absolute duty of every other to concede. To refuse it, under whatsoever pretext, would be a violation of the positive rule and fundamental principle of international jurisprudence. And no civilised nation can now be found to refuse to another an acknowledged and indisputable right. They may dispute the right itself, and deny its existence as a right, but there are none so low and debased in moral character as to deny their duty and obligation to respect the manifest and acknowledged international rights of others. Moreover, this obligation of

¹ Vattel, *Droit des Gens*, prelim.

the State is equally binding upon all its rulers, officers, and citizens—in fine, upon each and every individual member which composes the State or body politic.¹

States responsible for acts of their rulers

§ 4. The question here arises, how far a State is responsible for the acts of its rulers, officers, and private citizens, or, in other words, what are to be considered as the acts of the State, and what as the acts of individuals. There can be no doubt with respect to its responsibility for the acts of its rulers, whether they belong to the executive, legislative, or judicial department of the government, so far as the acts are done in their official capacity. States have relations with each other only through their respective governments, and, in international jurisprudence, the government is the State, no matter what may be its form or duration, whether it be a despotism, or a pure republic; whether it be a mere *de facto* government, organised for a temporary purpose, or one deriving its authority from long ages of legitimate descent.

Acts of subordinate officers

§ 5. The question, however, assumes a different aspect when we consider the acts of the subordinate officers of a State. A State is undoubtedly responsible for *all* the acts of its ambassadors and other public ministers furnished with *full power*, and also of all its diplomatic agents, within the limits of their presumed powers and duties, until such acts are expressly disclaimed by the State as being unauthorised. And even then it is bound, in general, to repair the wrong and to punish the offender; for a mere disclaimer is not always satisfactory to the party aggrieved. This rule is particularly applicable to the acts of its military and naval forces. These are regarded as the peculiar guardians of the honour and dignity of the State as represented by the flag under which they serve; moreover, the rigour of military law and military discipline would, by presumption, give to the act of a military officer a much higher degree of authority and responsibility than the act of a mere civil functionary. The former are under the immediate orders and direction of the head of the State, while the latter, though supposed to be governed by the laws of the State, are not always subject to the immediate direction of its executive government, or amenable to punishment. The act of a military or naval officer, in his official capacity, is, therefore, *prima facie* the act of his government,

¹ Vattel, *Droit des Gens*, liv. ii. ch. v. § 63.

and is to be so regarded till disavowed by his government. The officer's commission is, in general, to be regarded as sufficient evidence of his authority. If the act of the officer be disavowed by his government, the latter is bound to punish him, or to surrender him for punishment by the injured party.¹

§ 6. Vattel discusses, at considerable length, the question, **Acts of private citizens** how far the sovereign or State is responsible to another for the acts of private citizens or subjects. 'Whoever,' he says, 'offends the State, injures its rights, disturbs its tranquillity, or does it a prejudice in any manner whatsoever, declares himself its enemy, and puts himself in a situation to be justly punished for it. Whoever uses a citizen ill, indirectly offends the State, which ought to protect this citizen, and his sovereign should revenge the injuries, punish the aggressor, and, if possible, oblige him to make entire satisfaction ; since, otherwise, the citizen would not obtain the great end of the civil association, which is safety. On the other hand, the nation, or the sovereign, ought not to suffer the citizens to do an injury to the subjects of another State, much less to offend the State itself. And that, not only because no sovereign ought to permit those who are under his command to violate the precepts of the law of nature, but, also, because nations ought mutually to respect each other, to abstain from all offence, from all injury, and, in a word, from everything that may be of prejudice to others. If a sovereign, who might keep his subjects within the rules of justice and peace, suffers them to injure a foreign nation, either in its body or its members, he does no less injury to that nation than if he injured them himself. In short, the safety of the State, and that of human society, requires this attention from every sovereign.' Again, 'as it is impossible for the best regulated State, or for the most vigilant and absolute sovereign, to model, at his pleasure, all the actions of his subjects, and to confine them, on every occasion, to the most exact obedience, it would be unjust to impute to the nation, or to the sovereign, all the faults of the citizens. We ought not then to say, in general, that we have received an injury from a nation, because we have received it from one of its members.' The act of the individual is not necessarily

¹ Lieber, *Political Ethics*, b. vii. § 26 ; De Félice, *Droit de la Nat.*, &c., tome ii. lec. xv. See *post.*, ch. xiv. § 19.

and of consequence the act of the State, nor would it be just, in all cases, to hold a State responsible for the act of each individual member of which it is composed. The responsibility of the State results from its neglect or inability to control the conduct of its subjects, or its neglect or inability to punish the offences and crimes which they commit.¹ 'But,' says the same author, 'if a nation, or its ruler, approves and ratifies the act committed by a citizen, it makes that act its own; the offence must then be attributed to the nation as the true author of the injury, of which the citizen is, perhaps, only the instrument.' So, also, the sovereign who refuses to cause a reparation to be made of the damage done by his subject, or to punish the guilty, or, in short, to deliver him up, renders himself, in some measure, an accomplice in the injury, and becomes responsible for it. If a nation should refuse or fail to pass the laws necessary to restrain its citizens from aggressions upon other States, or upon their citizens, or if, such laws being enacted, the officers of the State neglect to enforce them, and such aggressions by individuals result therefrom, the State is unquestionably responsible for the injury.

Piracy by
sea and
land

§ 7. 'There is another case,' he continues, 'where the nation in general is guilty of the base attempt of its members. That is when, by its manners, or the maxims of its government, it accustoms and authorises its citizens to plunder and ill-use foreigners, or to make inroads into neighbouring countries, &c. Thus, the nation of the Usbecks is guilty of the robberies committed by the individuals of which it is composed. The princes, whose subjects are robbed and massacred, and whose lands are infested by these robbers, may justly punish the entire nation. What do I say?—all nations have a right to enter into a league against such a people, to repress them, and to treat them as the common enemies of the human race.' So, with respect to Algiers, and the States of the Mediterranean, from whose ports issued numerous corsairs to prey upon the commerce of other nations; who would say that the whole State was not justly punishable for these acts of its subjects? or who would think of applying to them the doctrine that the individual alone was respon-

¹ Vattel, *Droit des Gens*, liv. ii. ch. vi. § 71; Phillimore, *On Int. Law*, vol. i. § 218; Rutherforth, *Institutes*, b. ii. ch. ix. § 12.

sible? There are, in modern times, and among Christian States, Usbecks and Algerines, in practice, if not in principle. If a State should neglect to enact the requisite laws to restrain its subjects and citizens from repeated and systematic aggressions upon the rights of others, or to enforce such laws when enacted, it not only exposes itself to the just hostilities of the parties aggrieved, but virtually becomes an outlaw from the society of nations, and, by the well-established principles of international jurisprudence, is liable to be attacked and punished by all, as the universal enemy of mankind. Systematic and organised aggressions upon the rights of independent States, and robbery and plunder upon land, by whatsoever name they may be called, or under whatsoever pretext they may be carried on, are as objectionable in their character, and as dangerous in their tendency, as piracy on the high seas. Piracy by the law of nations, by whomsoever or wheresoever committed, may be tried and punished in the courts of justice of any nation,¹ inasmuch as all nations have an equal

¹ Piracy is punishable in British Courts by virtue of the 7 Will. IV. and 1 Vict., c. 88, s. 2, which provides that whosoever, with intent to commit, or at the time of, or immediately before, or immediately after committing the crime of piracy in respect of any ship or vessel, shall assault, with intent to murder, any person being on board of, or belonging to, such ship or vessel, or shall stab, cut, or wound any such person, or unlawfully do any act whereby the life of such person may be endangered, shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon. And by s. 3, whosoever shall be convicted of any offence, which, by the 28 Hen. VIII., c. 15; 11 and 12 Will. III., c. 7; 4 Geo. I., c. 11; 8 Geo. I., c. 24; or 18 Geo. II., c. 30, amounts to the crime of piracy, and is thereby made punishable with death, shall be liable, at the discretion of the court, to be sent to penal servitude for life, or for not less than fifteen years (20 and 21 Vict., c. 3, s. 2), or to be imprisoned for two years (9 and 10 Vict., c. 24, s. 1).—See *R. v. Jones*, 11 *Cox.*, 390; *R. v. Zulueta*, 1 *C. and K.*, 215; *R. v. Sawyer*, *R. and R.*, 294.

Authorities seem to agree that a ship of a neutral commissioned by a belligerent is not a pirate.

If a ship were attacked by pirates, and her master became a slave to the captors, for the purpose of redeeming her, the ship and lading were, by the Maritime Law, tacitly presumed to be bound for his redemption by a general contribution. But not so, if the master had through his own folly suffered the ship to be taken.

The Civil or Admiralty Law, which used in England to govern the case of pirates, did not recognise any wrong in promising a ransom to a pirate and afterwards not complying with it; for the Law of Arms is not enjoyed by pirates, nor are they enemies in the true sense of the word, and, therefore, they do not enjoy the privileges of such. Notwithstanding this, it is said that a pirate may, by the Civil Law, demand justice in the Courts of Law for wrongs done to him (*Bodin*, l. i. c. 1). All ransom, whether to pirate or to enemy, is forbidden by the British Prize Act, 1864, 27 and 28 Vict., c. 25.

interest in the apprehension and punishment of such offences against international law. And it has been contended by some, that the same principle is applicable to similar crimes committed on land, and that those who, without the authority or commission of any State, and in defiance of all law, organise and band together for predatory and illegal military expeditions, are equally punishable, under the law of nations, in the courts of any State having custody of the offenders. However this may be, and whether or not such individual offenders are justiciable in the same manner as pirates, there can be no question of the guilt and responsibility of a government which encourages or permits its private citizens to organise and engage in such predatory and unlawful expeditions, against a State with which that government is at peace. Nor does it matter much what may be the ostensible or intended object of such unauthorised expeditions; whether it be to overthrow a despotism, or repress anarchy, and to establish a liberal government in their place, or to destroy a liberal government, and to establish a despotism, or produce general anarchy, the offence, in international law, is the same.¹ In either case it is a violation of the international rights of others, and the State which permits its citizens or subjects to commit the offence, or neglects to punish them for it, is responsible for their acts.

**Definition
of piracy**

§ 8. Mr. Justice Trott, Judge of the Vice-Admiralty Court of Charlestown, South Carolina, in the course of his judgment in the trial of Bonnet and others, for piracy, in 1718,² defines piracy to be a robbery committed upon the sea, and a pirate to be a sea thief. Indeed, the word 'pirata,' as it is derived from *παιρᾶν*, 'transire, a transeundo mare,' was

¹ One Most, a German, published and circulated a newspaper called the *Freiheit*, written in the German language, in London, which contained an article exulting in the then recent murder of the Emperor of Russia, commending it to revolutionists throughout the world, and justifying the crime of assassination of the lives of the sovereigns of Europe. It was held by the English Court of Crown Cases Reserved that the writer was liable to be punished for conspiring or soliciting to commit murder, under the Act 24 and 25 Vict., c. 100, s. 4. (44 *L. T. N. S.* 823.)

Peltier, the editor of a French newspaper published in London, called the *Ambigu*, was prosecuted by the Attorney-General in the English courts, and convicted of a libel on Bonaparte in 1802; but he escaped punishment owing to war breaking out between the two nations. (*Ann. Reg.* 1803, p. 230.)

² 15 *State Trials*, 1231.

anciently taken in a good and honourable sense, and signified a maritime knight and an admiral or commander at sea, as appears by the several testimonies and records cited to that purpose by that learned antiquary, Sir Henry Spelman, in his 'Glossarium.' And out of him the same sense of the word is remarked by Dr. Cowell, in his 'Interpreter,' and by Blount in his 'Law Dictionary.' But afterwards the word was taken in an ill sense, and signified a sea rover or robber, either from the Greek word *πειρα*, *deceptio*, *dolus*, 'deceit,' or from the word *πειρᾶν*, 'transire,' of their wandering up and down and resting in no place, but 'coasting hither and thither to do mischief;' and from this sense, οἱ κατὰ θάλασσαν κακοῦργοι, sea malefactors were called *πειραταὶ*, pirates.

'I apprehend,' said Dr. Lushington in the case of the Magellan pirates¹ (1853), 'that in the administration of our criminal law, generally speaking, all persons are held to be pirates who are found guilty of piratical acts, and piratical acts are robbery and murder upon the high seas. I do not believe that even where human life was at stake, our courts of common law ever thought it necessary to extend their enquiry further, if it was clearly proved against the accused that they had committed robbery and murder on the high seas. In that case they were adjudged to be pirates and suffered accordingly. Whatever may have been the definition in some of the books, it was never, so far as I am able to find, deemed necessary to enquire whether parties so convicted of these crimes had intended to rob on the high seas or to murder upon the high seas indiscriminately. Though the municipal law of different countries may and does differ in many respects as to its definition of piracy, yet I apprehend that all nations agree in this, that acts, such as those I have mentioned, when committed on the high seas, are piratical acts, and contrary to the laws of nations. Subjects of one country may rebel, but it does not follow that, because rebels and insurgents may commit against the ruling powers of their own country acts of violence, they may not be pirates also,² or that they may not

¹ Spink's *Admiralty R.*, 83; see also *United States v. Smith*, 5 *Wheat.*, 153.

² The following is an example of the loss of nationality of a ship of war, and of her becoming a pirate. On the evening of May 6, 1877, the crew of a Peruvian ship of war, the 'Huascar' (a turret ship of 1,101 tons (1865), length 190 feet, breadth 35 feet, depth 17 feet 10 inches), anchored

commit piratical acts against the subjects of other States, especially if such acts were in no degree connected with the

in the bay of Callao, revolted, and declared in favour of Don Nicolas Pierola. The captain and most of the officers were on shore at the time, and those who remained on board headed the mutiny. Several naval officers, both from the shore and other men-of-war, took part in the movement, which was also aided by some civilians friends to the cause of Señor Pierola. The vessel was immediately got under weigh without any attempt apparently being made to detain her by the other men-of-war anchored near her, and she eventually got clear of the bay, and proceeded towards the south. Two days afterwards the following decree was issued by the President of the Republic :—

‘Art. 1. Let the proper procedure be commenced against the authors and their accomplices who committed the crimes that took place on board the monitor “Huascar” on the night of the 6th instant.

‘Art. 2. The Government declare that the Republic is not responsible for the acts of the rebels, of whatsoever nature they may be.

‘Art. 3. The Government authorise the capture of the “Huascar,” and offer to recompense properly all those who, not belonging to the crews of the vessels forming the squadron of operation, shall bring her under the authority of the Government, or who may contribute to do so.’

In the meantime the ‘Huascar’ proceeded to Mollendo, where she boarded a British steamer, and demanded the official correspondence, which was refused ; whereupon the officer of the ‘Huascar’ stated that he did not like to use force, as Señor Pierola was not yet on board, but that they soon expected orders to seize the mails when they thought proper to do so. A few days later the ‘Huascar’ stopped the British mail steamer from Liverpool, on the high seas, by firing a blank cartridge. On this occasion also the officers who boarded the steamer demanded the official correspondence, which was refused, and they retired without resorting to violence. Afterwards she stopped another British steamer, and took out of her by force Colonels Varela and Espinosa, two Government officials, who were passengers, and who were going to Iquique on the Government service. Finally, Rear-Admiral de Horsey, the British Commander-in-Chief, received a telegram from her Majesty’s Consul at Arica, informing him that the ‘Huascar’ had taken seven lighters of coals from an English vessel, without making any arrangements as to payment. Under these circumstances the Admiral considered it his duty, in view of the Peruvian Government decree declaring that the Republic was not responsible for the actions of that vessel, to seize the ‘Huascar,’ in order to put a stop to her proceedings against British interests ; and he consequently proceeded to sea in H.M.S. ‘Shah’ for that purpose. The ‘Huascar,’ having refused to obey his summons, the Admiral engaged her in Peruvian waters, off the town of Pacocha, and he also sent a torpedo expedition to blow her up ; this failed, owing to the ‘Huascar’ having got away under cover of the night. After her engagement with, and escape from, the ‘Shah,’ she appeared off Iquique with a flag of truce flying. The Peruvian squadron went out to meet her, and communication was established. After much parleying the ‘Huascar’ surrendered, first making terms that everyone on board that ship, except Pierola himself, should be set at liberty. The Peruvian Republic complained to the British Government of the conduct of Rear-Admiral de Horsey, alleging that the ‘Huascar’ did not, on account of having refused to recognise the authority of the Government of Peru, cease to belong to Peru ; and that, although the supreme decree of May 8 was issued to bring about the apprehension of the ‘Huascar,’ foreign ships of war were not thereby entitled to attack her, not only because international law prohibited mixing in the internal

insurrection or rebellion. Even an independent State may be guilty of piratical acts. What were the Barbary pirates?

affairs of other States, but also because the reward offered by the decree could not refer to the commanders of such ships without grossly offending their personal and national dignity. The British Government having required the opinion of its law officers on the subject, the latter reported that in their opinion the papers submitted to them showed that the 'Huascar' had been taken out of the hands of her lawful officers; that the Peruvian Government had disavowed any liability for her acts; that she was consequently sailing under no *national* flag; and that no redress could be obtained for any acts which she might commit. Therefore, they were of opinion that in this state of things Admiral de Horsey was bound to act decisively for the protection of British subjects and property, and that the proceedings resorted to by him were in law justifiable. Lord Derby approved of the Admiral putting a stop to the lawless proceedings of the 'Huascar,' but at the same time expressed regret that he had not in the first instance endeavoured to obtain redress by means of remonstrance.

On the question being brought before the House of Commons, the Attorney-General expressed his opinion that the 'Huascar' was not a belligerent, but a rover committing depredations which made her an enemy of her Britannic Majesty; and, therefore, it could not be disputed that the Admiral could wage war upon her. If she were a belligerent, or the vessel of a belligerent Power, to which the representative of the British Government was under an obligation to extend belligerent rights, the proceedings of the Admiral might be open to censure. But to make out that she was a vessel belonging to a belligerent Power, there must be a rebellion; the rebels, also, must have established something like a government, to do certain acts upon the high seas against neutral ships. If a cruiser did commit acts of depredation without authority, the neutral States would demand satisfaction. If the 'Huascar' were a belligerent, she would be responsible. In strictness the crew of the 'Huascar' were pirates, and might have been treated as such; but it was one thing to say that, according to the strict letter of the law, people have been guilty of acts of piracy, and another to advise that they should be tried for their lives and hanged at Newgate. The 'Huascar' was called upon to surrender, and she refused. The Admiral took steps accordingly to make her surrender. (*H. of C. Debates*, 1877.)

Again, in 1873, an insurrection having broken out on the south-east of Spain, the insurgents seized some Spanish vessels of war at Carthagena. The Spanish Government proclaimed the insurgents to be pirates; but Great Britain, France, and Germany directed their vessels of war to assume no criminal jurisdiction over the insurgents, the so-called piracy being considered to be of a political character. In the same year the 'Virginius,' bearing the flag of the United States, was captured by a Spanish war steamer on waters claimed by the Spanish authorities to be territorial, and was brought to Cuba with her crew and passengers, where 53 of the same were put to death, including subjects of Great Britain and of the United States; the charge being piracy, and connection with certain Cuban insurgents. She had been registered in 1870 at New York as an American vessel, but leaving that port shortly afterwards, had not been again within the jurisdiction of the United States. That Government required the restoration of the 'Virginius' and the surrender of the survivors of her passengers and crew, and a due reparation to the flag and the punishment of the authorities who had been guilty of the violence. The Spanish Government recognised the justice of this demand. No state of war existed, conferring upon a maritime Power the right to molest and detain upon the high seas a documented

What are the African tribes? I am well aware that it has been said that a State cannot be piratical, but I am not disposed to assent to such *dictum* as a universal proposition.'

Sir Leoline Jenkins, who was Judge of the Admiralty in the seventeenth century, thus defines piracy, in giving a charge to the grand jury at an Admiralty sessions:—'The next sort of offences pointed out in the statute are robberies; and a robbery, when it is committed upon the sea, is what we call *piracy*. A robbery, when it is committed upon the land, does imply three things—1, that there be a violent assault; 2, that a man's goods be actually taken from his person or possession; 3, that he who is despoiled be put in fear thereby. When this is done upon the sea, when one or more persons enter on board a ship with force and arms, and those in the ship have their ship carried away by violence, or their goods taken away out of their possession, and are put in fright by the assault, this is *piracy*; and he that does so is a *pirate* or a *robber* within the statute. Nor does it differ the case though the party so assaulted and despoiled should be a foreigner, not born within the King's allegiance; if he be *de amicitia Regis* he is *eo nomine* under the King's protection, and to rob such a one upon the seas is *piracy*. Nor will it be any defence to a man, who takes away by force another's ship or goods at sea, that he hath a commission of war from some foreign prince, unless the person he takes from be a lawful enemy to that prince. . . . For there may be accessories in this (*piracy*) as well as other felonies, and they are punishable here; *piracy* being now made *felony* by a statute law, and when any offence is felony, either at the common law or by statute, all accessories, both before and after, are incidentally included.'

Plea of
emigra-
tion and
expatria-
tion

§ 9. Attempts have sometimes been made to excuse the State, or to exempt it from responsibility, for the acts of its citizens who engage in such unauthorised and illegal military expeditions, or who organise, or assist in organising, 'filibuster' expeditions against other nations, on the ground that vessel; and it could not be pretended that the 'Virginus' had placed herself without the pale of all law by acts of piracy against the human race, although she was doubtless about to aid in an insurrection; but she had not, when captured, committed any overt act of revolt and had been guilty of no violence. (Wharton, *Int. Law*, Dig. iii. 327.)

¹ *Life of Sir Leoline Jenkins*, i. 94; see also 'A Charge at an Admiralty Sessions,' with notes, by Sir Sherston Baker, *Law Magazine and Review*, No. 257, p. 412.

such citizens are, by the very act of emigration, virtually *expatriated*, and can no longer be regarded as subjects whose conduct the State can control, or for whose acts it can be held responsible. The right of voluntary expatriation in time of peace has already been considered ;¹ it is sufficient for the present discussion to remark that all agree that it can never be pleaded in justification of an offence against law, public or municipal, which was committed or contemplated in the act of pretended emigration. If individuals were allowed to escape punishment for engaging in illegal enterprises, on the ground of expatriation by pretended emigration, the same excuse could be appealed to to cover treason, desertion, and other crimes, and to avoid the performance of local contracts. And if individuals cannot escape responsibility to their own government for any unlawful act contemplated at the time of emigration, which they may do, it clearly follows that the State cannot escape moral or legal responsibility for the unlawful acts of its citizens, under the plea of their implied expatriation by pretended emigration. Emigration for an unlawful purpose is, in itself, an unlawful act, and may be prohibited by the State ; and if such contemplated emigration of its citizens is intended to infringe the rights of a friendly nation, it is undoubtedly the duty of the State to exercise its right of prohibition and power of prevention. It cannot escape the responsibility of neglecting that duty, under the miserable pretext of the voluntary emigration, and consequent expatriation, of its citizens.²

§ 10. It is the duty of every State to show all proper respect and honour to other sovereign States, whether the dignity of such States be represented in the person of their sovereign, their flag, their ministers, or their subordinate officers. A want of respect to a subordinate officer, however, is not, by any means, to be necessarily construed into a want of respect for the State to which he belongs, for such officers do not, necessarily, nor even by implication, represent the dignity of their State or nation. To be wanting in respect to the representatives and officers of other States is a mark of ill-will, and

Duties of
mutual
respect

¹ See ch. xii. § 3.

² Kent, *Com. on Am. Law*, vol. ii. p. 49 ; Cushing, *Opinions of U. S. Attys.-Genl.*, vol. viii. p. 139 ; Jefferson, *Am. State Papers, Foreign Relations*, vol. i. p. 168 ; *Murry v. the 'Charming Betsy'*, 2 *Cranch. R.*, 64 ; De Félice, *Droit de la Nat.*, &c., tome ii. lec. 15.

such conduct is equally contrary to sound policy, and to what nations owe to each other. This most blamable and criminal disposition of States to imagine themselves insulted, where really no disrespect is intended, is thus forcibly described by Dymond : 'The wars that are waged for *insults to flags*, and an endless train of similar motives, are perhaps generally attributable to the irritability of our pride. We are at no pains to appear pacific toward the offender ; our remonstrance is a threat, and the nation which would give satisfaction to an *inquiry*, will give no other answer to a menace than a menace in return. At length we begin to fight, not because we are aggrieved, but because we are angry.'¹

Failure in
respect
not
always an
insult

§ 11. But to fail in matters merely ceremonial, by not rendering the respect and honour which usage and custom have established as properly due to others, is not necessarily an insult to the dignity of a State or of its sovereign. 'It is proper,' says Vattel, 'to distinguish between negligence or the omission of what ought to be done according to commonly received custom, and positive acts of disrespect and insult. The prince may complain of negligence, and, if it is not repaired, may consider it as a mark of a bad disposition ; he has a right to demand, even by force of arms, the reparation of an insult. The Czar, Peter I., complained in his manifesto against Sweden, of their not having fired the cannon on his passage to Riga. He might think it strange that they did not pay him this mark of respect, and he might complain of it ; but to make this the cause of a war, was being extremely prodigal of human blood.' The subject of military and maritime ceremonial, as connected with international etiquette and intercourse, has already been discussed in the chapter on the rights of equality.²

Right to
trade

§ 12. Vattel lays down the general rule that 'every nation, in virtue of its natural liberty, has a right to trade with those which shall be willing to correspond with such intentions, and to molest it in the exercise of its right, is an injury. The Portuguese, at the time of their great power in the East Indies, were for excluding all other European nations from any commerce with the Indians ; but a pretension, no less iniquitous than chimerical, was made a jest of, and the nations agreed to

¹ Dymond, *Essays on the Prin. of Morality*, essay iii. ch. xix.

² *Ante*, p. 124 et seq.

look on any acts of violence in support of it as just causes of war. This common right of all nations is, at present, acknowledged under the appellation of freedom of trade.' This right, however, is to be distinguished from the claim of one nation to trade with the colonies or dependencies of another.¹

§ 13. To this right of trade there is a corresponding duty of mutual commerce, founded on the general law of nature; for, says Vattel, 'one country abounds in corn, another in pastures and cattle, a third in timber and metals; all these countries trading together, agreeably to human nature, no one will be without such things as are useful and necessary, and the views of nature, our common mother, will be fulfilled. Further, one country is fitter for some kind of products than another; as for vineyards more than tillage. If trade and barter take place, every nation, on the certainty of procuring what it wants, will employ its industry and its ground in the most advantageous manner, and mankind in general proves a gainer by it. Such are the foundations of the general obligation incumbent on nations reciprocally to cultivate commerce. Therefore, every one is not only to join in trade as far as it reasonably can, but even to countenance and promote it.'²

§ 14. The general right of trade, and the general duty of a State to facilitate commercial intercourse with others, are well-settled principles of international law; nor is it anywhere denied that a nation has a right to decline a particular commerce which it may deem disadvantageous or injurious. But the question has sometimes been discussed, whether a State has a right to absolutely decline commercial intercourse with others, and whether, by so doing, it does not subject itself to punishment for a violation of a positive law of nations. Vattel says that, as every State has a perfect right to determine what is useful or salutary for it, it becomes a duty, as well as a right, for a nation to judge whether it is expedient to engage in a proposed trade, or to refuse any commercial overtures from others, and that such others have no 'right to accuse it of injustice, or to demand a reason for such refusal, much less, to use compulsion. It is free in the administration of its own affairs, without being accountable to any other. The obligation of trading with a foreign State is imperfect in itself, and gives them only an imperfect right; so that in cases where

¹ Vattel, *Droit des Gens*, liv. ii. ch. ii. §§ 24, 48. ² Vattel, *suprà*.

the commerce would be detrimental, it is entirely void.' 'The Spaniards, falling on the American Indians, under a pretence that these people refused to traffic with them, endeavoured in vain to cover their insatiable avarice.'¹

Case of
China and
Japan

§ 15. China and Japan for a long time declined all commercial intercourse with other nations, although they traded among themselves, and sometimes with the Dutch. The question was at one time discussed, whether these people could not be compelled to open their ports to foreigners, and engage in trade and general intercourse with the rest of the world. But, as a question of international jurisprudence, it scarcely merits consideration. Every nation has the right of judging for itself, in respect of the policy and extent of its commercial arrangements. Therefore the general freedom of trade is but an imperfect right, and subject to such restrictions as each nation may think proper to prescribe.

Imperfect
duties

§ 16. We have already discussed the duty of diplomatic intercourse, of legation, treaty, &c., and it is only necessary, in this place, to add a few remarks on the general character of the obligations resulting from this class of imperfect rights and duties. As already stated, a right is no less a right because it belongs to the class called *imperfect* in international law ; so of a duty, it is none the less obligatory because it is *imperfect*, and cannot be enforced under the rules of international jurisprudence. Thus it is with the principles of natural law with respect to the mutual commerce of States. It is not difficult to point out the general duties of nations with respect to trade, but the application of a rule founded on generalities must always be uncertain. Therefore, says Vattel, if nations wish to secure to themselves something constant, punctual, and determined in trade, treaties are the only means of procuring it.²

Mutual
assistance

§ 17. With respect to the mutual duties of States, not established or taken cognisance of by the positive law of nations, but resting entirely on natural law, Vattel lays down the general principle that one State owes to another State whatever it owes to itself, as far as this other stands in need

¹ Vattel, *suprà* ; Martens, *Précis du Droit des Gens*, §§ 139 et seq. ; Massé, *Droit Commercial*, liv. i. tit. i.

² Vattel, *Droit des Gens*, liv. ii. ch. ii. § 26 ; Paley, *Moral and Pol. Philosophy*, b. ii. ch. x. ; and see *ante*, ch. xi. § 25.

of assistance, and the latter can grant it without neglecting the duties it owes to itself.¹ Such, he says, is the eternal and immutable law of nature. In limitation or explanation of this rule, he makes the following observations: 'Social bodies, or sovereign States,' says Vattel, 'are much more capable of supporting themselves than individuals, and mutual assistance is not so necessary among them, nor of such frequent use. Now, whatever a nation can do itself, no succour is there due to it from others.'

§ 18. Among the mutual duties of States, arising from natural law, are the offices of humanity, such as relieving the distresses and wants of others, so far as is reconcilable with our duty towards ourselves. Thus, if a nation is suffering under a famine, all others having a quantity of provisions, are bound to relieve its distress, yet, without thereby exposing themselves to want. 'But,' continues Vattel, 'if this nation is able to pay for the provisions thus furnished, it is entirely lawful to sell them at a reasonable rate; for what it can procure is not due to it, and, consequently, there is no obligation of giving for nothing such things as it is able to purchase. Succour, in such a severe extremity, is essentially agreeable to human nature, and a civil nation very seldom is seen to be absolutely wanting in such.' Contributions of provisions, by the people of the United States, to the starving population of Madeira, is an example of the performance of this natural duty.

Mutual
duties of
humanity

§ 19. The like assistance is due, whatever be the calamity by which a nation is afflicted. Whole sections of countries are sometimes devastated by floods, and cities and towns destroyed by fires or earthquakes, leaving vast numbers of people destitute of the means of shelter or subsistence. It is, first, the duty of their own government to provide for these wants; but not unfrequently the calamity is so great that the government is unable to give its aid to the extent and within the time required to render it efficacious. In such cases, the laws of humanity would impose a duty upon others. In many instances of this kind, however, the active charity of individuals and communities renders any action on the part of the governments of other States unnecessary. But a government may always stimulate and assist such charity,

In case of
flood, fire,
&c.

¹ Vattel, *Droit des Gens*, liv. ii. ch. i. § 3.

and thus by reflecting and giving effect to the general feelings of its people, manifest its sympathy and generosity. Of such a character was the assistance rendered by the government of the United States in 1847 for transporting to Ireland the contributions of provisions spontaneously offered by the American people; while the philanthropy of the people of Great Britain is well known, nor has national expression of sympathy, and pecuniary aid, been wanting on their part towards other nations. To quote only one example. No sooner was the news of the conflagration of Chicago of 1871 telegraphed to London, than 10,000*l.* was immediately subscribed, while large subscriptions were raised in provincial towns. The Common Council of the City of London alone gave 1,000 guineas.

For the
preserva-
tion of
others

§ 20. A question here arises, how far one State may afford assistance to another nation suffering famine and distresses which immediately result from the operations of a war. We refer, of course, to the offices of humanity, and not to assistance in the means of carrying on hostilities. The furnishing of provisions and clothing to a starving and suffering people, may, or may not, assist in prolonging the war. In case of a siege or blockade, no neutral State can furnish food to the inhabitants of the place so besieged or blockaded, without a violation of its neutral duties, no matter how much they may suffer, or how strong may be the dictates of humanity to relieve such suffering. So, also, an enemy may sometimes devastate whole sections of a country, and reduce the inhabitants to the miseries of famine, but this would not, *ipso facto*, justify another State to furnish them with relief. The rights and duties of the neutral will be determined by the peculiar circumstances of each case, and it would, therefore, be difficult to lay down any positive and invariable rule on this subject. There can be no doubt, however, that when the war is ended, or its operations are removed from the particular place or section of country, foreign nations may extend the offices of humanity to relieve the distresses of a suffering people. Of such a character was the assistance rendered by the people of the United States to the suffering inhabitants of modern Greece, in their struggle against the Turks.¹

¹ Grotius, *De Jure Bell. ac Pac.*, lib. iii. cap. i. § 5; Bynkershoek, *Quaest. Jur. Pub.*, lib. i. cap. xi.; Gardner, *Institutes*, p. 682.

§ 21. Another question discussed by publicists is, how far it is the duty of one sovereign State to assist in preserving the independence of another State against the designs or attacks of its enemies. There can be no doubt of its duty to exert its moral influence, by way of advice, proffered mediation, &c., for the accomplishment of such an object; but this duty toward others does not extend to the use of force. The use of force for the benefit of others is not a matter of *obligation* (unless of treaty stipulation), and the question is entirely one of *policy*, which every State determines for itself. In Europe the question has been connected with that of preserving the equilibrium of power, and of preventing the aggrandisement of a particular State by the absorption of the dominions of another; ¹ or on religious grounds—real or alleged—as in the intervention of Russia in the affairs of Turkey in 1854 and 1877 for the protection of the Oriental Christians. In 1707, Sweden interfered on behalf of the Protestants of Poland; while the treaties of Velau 1657, Oliva 1660, Utrecht 1714, and of Breslau 1742, testify to interference on behalf of the Catholic subjects of Protestant sovereigns.

Duties of
humanity

§ 22. Having based the obligation of performing the offices of humanity solely on the law of nature, Vattel infers that no nation can refuse them to another on the plea of a

Difference
of reli-
gious
belief

The British Government, in 1810 (then at war with Denmark), having been informed that the inhabitants of the Feroe Islands and Iceland, part of the dominions of Denmark, were reduced to extreme misery, in consequence of the want of their accustomed supplies, ordered that they should not be disturbed by hostilities, but that they should be treated as neutrals. Moreover, a British Consul was appointed to Iceland.

¹ Phillimore, *On Int. Law*, vol. i. §§ 406 et seq.; Ortolan, *Domaine International*, tit. iii.; De Félice, *Droit de la Nat.*, &c., tome ii. lec. xvi.

Again in 1860, Lord J. Russell, writing to Earl Cowley concerning the annexation of Savoy and Nice to France, says: 'But her Majesty's Government must be allowed to remark that a demand for cession of a neighbour's territory, made by a State so powerful as France and whose former and not very remote policy of territorial aggrandisement brought countless calamities upon Europe, cannot well fail to give umbrage to every State interested in the balance of power and in the maintenance of the general peace. Nor can that umbrage be diminished by the grounds on which the claim is founded, because if a great military power like France is to demand the territory of a neighbour upon its own theory of what constitutes geographically its proper system of defence, it is evident no State could be secure from the aggressions of a more powerful neighbour; that might, not right, would henceforth be the rule to determine territorial possession; and that the integrity and independence of the smaller States of Europe would be placed in perpetual jeopardy.'

difference of religious belief. 'A conformity of belief and worship,' he says, 'may become a new tie of friendship between nations, but no difference in them can warrant us to lay aside the quality of humanity, or the sentiments annexed to it.' He quotes with approbation the conduct of Pope Benedict XIV., who, on being informed that several Dutch ships at Civita Vecchia could not put to sea for fear of some Algerine corsairs, immediately ordered the frigates of the States of the Church to convoy them out of danger; and his nuncio at Brussels was directed to signify to the States-General that His Holiness would perform the duties of humanity without reference to the difference of religion. The same rule extends to commercial rivals. The fact that a State, or any of its inhabitants, are our rivals in trade, would furnish us with no excuse for neglecting toward them the duties of humanity; on the contrary, those engaged in like pursuits are usually best acquainted with each other's wants, and best able to relieve each other's necessities. It also extends to cases of national hostility. Frequent wars and mutual aggressions sometimes produce feelings of deep-seated hostility between citizens and subjects of different States. Such enmities do not in any way affect the general obligations of humanity; unfortunately, however, they are not unfrequently made a pretext or excuse for neglecting their performance. The excuse is not admissible in morality, nor will it ever avail much in the general opinion of the world. National enmities, and national vanities, often blunt the sense of natural and moral duty, and are sometimes mistaken for patriotism.¹

Quarantine

§ 23. The increasing maritime commerce between different nations calls imperatively for a uniformity of the laws by which the practice of quarantine should be governed.² If one State abolishes or relaxes its measures of quarantine, and a neighbouring State preserves a vigorous procedure, it is evident that the advantages which may result to commerce from the reforms of the one will be materially depreciated, or even more than counterbalanced, by the severity of the quarantine which the other State will exercise towards vessels

¹ Vattel, *Droit des Gens*, liv. ii. ch. i. §§ 15, 16; Lieber, *Political Ethics*, b. iii. §§ 65-67, and see ch. xxii. § 22.

² See the proposed *International Rules of Quarantine*, by Sir Sherston Baker, 1879, approved of by the United States and by several foreign governments.

arriving from the ports of the former. It is, therefore, the interest of all—especially of neighbouring—States that their measures of prevention should be uniform. Judging from past experience, no age can safely delude itself with the belief, that the dire visitations of pestilence, and of cognate disease, are things of the past, and that precautions may be disregarded. Malta suffered frequently from the plague; for 130 years it enjoyed an exemption, and, doubtless, its inhabitants delighted to believe that, however near it might be, it would never revisit them; it did appear, however, in 1813, and carried off upwards of 4,000 persons. The inhabitants of this island are now very sensitive on the subject of quarantine. With this and similar lessons before them, is it to be wondered at? Quarantine in Great Britain is governed by the statute 6 Geo. IV., c. 78, assisted by the Public Health Act of 1875. Ships of war are equally bound with merchant ships to respect municipal quarantine regulations. The ‘United States Navy Regulations,’ 1876, ch. xxii., and the ‘Queen’s Regulations and Admiralty Instructions of Great Britain,’ 1879, §§ 1940–47, both refer to this.

§ 24. As the reciprocation of the duties, or offices of humanity, says Vattel, ‘is to take place betwixt nation and nation, according as one stands in need, and the other can reasonably comply with them, every nation being free, independent, and having the disposal of its actions, each is to consider whether its situation warrants asking or granting anything on this head. Every nation has a right to ask of another that assistance and kind offices which it conceives itself to stand in need of. This it cannot be denied without injury. If the demand be unnecessary it is thereby guilty of a breach of duty; but herein it does not depend on the judgment of another. A nation has a right of asking, but not of requiring.’ Again, the same author remarks that these offices of humanity, ‘being due only in necessity, and by a nation which can comply with them without being wanting to itself, the nation which is applied to, has, on the other hand, a right of judging whether the case really demands them, and whether circumstances will allow it to grant them consistently with what is owing to its own safety and concerns. For instance, a nation is in want of corn, and makes a demand to purchase of another; this latter is to judge whether such a compliance

A nation
may ask
for but
not
require
services

will not expose itself to scarcity ; and a denial is to be acquiesced in without resentment.' With respect to the rule and measure of the duties of nations to extend to others the offices of humanity and assistance, Vattel makes the following sensible and judicious remarks : ' Melancholy experience shows that most nations mind only strengthening and enriching themselves, at the expense of others, or lording it over them, and even, if an opportunity offers, oppressing and bringing them under the yoke. Prudence does not allow us to strengthen an enemy, or him in whom we discover a desire of plundering and oppressing us, and the care of our safety forbids it. We have seen that a nation does not owe its assistance and the offices of humanity to another any further than as they are reconcilable with the duties towards itself. Hence, it evidently follows that, though the universal law of mankind obliges us to grant, at all times, and to all, even to our enemies, those offices which are of a tendency to render them more moderate and virtuous, because no inconveniency is to be feared from such dispositions, yet we are not obliged to give them such succours as probably may be pernicious to ourselves. Thus, the exceeding importance of trade, not only to the wants and conveniences of life, but likewise to the forces of the State for furnishing it with the means of defending itself against its enemies, and the insatiable avidity of those nations which seek totally to engross it exclusive of others ; thus, I say, these circumstances authorise a nation, possessed of a branch of trade, or the secret of some important manufacture or fabric, to reserve to itself those sources of wealth, and so far from communicating them, to take measures against it ; but things necessary to the life or conveniency of others, this nation must sell them at a reasonable price, and not abuse its monopoly by iniquitous and hateful exactions. . . . As to things more directly useful for war, a people is under no obligation of selling them to others of whom it has any well-grounded suspicion ; and even prudence declares against it.' ¹

§ 25. The right of a State to expel foreigners from her territories is sometimes called the *Droit de Renvoi*.² Since

¹ Vattel, *Droit des Gens*, liv. ii. ch. i. §§ 15, 16 ; Lieber, *Political Ethics*, b. iii. §§ 65-67.

² The 5 Geo. I., c. 27, and other statutes prohibited certain workmen

every State is obliged to receive its own subjects, even after they have emigrated abroad, so there is a corresponding power of every State to send away a foreign citizen who has immigrated there. This right of a State ceases where a foreigner has been naturalised in the particular State. A memorable example of the exercise of this power in time of peace was the passage of the Alien Law of the United States in 1798. Immigration to the United States is regulated by the Acts of Congress of 1875 and 1882. By the Act 11 and 12 Vict., c. 20, power was given in 1848 to the executive in England and Ireland to remove aliens from the realm, but it is no longer in force. Foreign Jews have frequently been expelled from Russia, and as lately as 1881 from Tangiers. Concomitant with the *Droit de Renvoi* is that of the taxation of aliens by the State in which they are commorant. This right includes the power to determine the amount which must be levied; it is a powerful incident to sovereignty, the exercise of which, unless abused, cannot in general be made the subject of diplomatic remonstrance. In 1883 the United States Government complained of the action of Cuba in imposing taxes on coloured citizens of the United States on account of their colour. The law of Louisiana, imposing a tax on legacies payable to aliens, probably is not opposed to International law.

Droit de Renvoi and taxation of foreigners

§ 26. Nothing tends more to the peace of the world, and the general comity and intercourse of nations, than mutual friendship and kind offices. The cultivation of international good-will and friendship is, therefore, one of the first and highest duties imposed upon every sovereign State. Rulers, however, are too apt to neglect this duty, and to seek to exalt their own patriotism by depreciating other countries, and inciting in their own people feelings of unkindness and hostility to their neighbours. Such conduct is very reprehensible, and its results are generally dangerous, if not disastrous. For the authorities of one State to abuse and depreciate the government of another, is a sure indication of weakness and want of civilisation and refinement. National irritability is mentioned by Dymond as a most prominent cause of war. 'It is assumed,' he says, 'not indeed upon the most rational

Duty of friendship and comity

from leaving England. These were repealed by the 5 Geo. IV., c. 97. See also *Flack v. Holn*, 1 *Jac. and Walk. R.*, 405.

grounds, that the best way of supporting the dignity, and maintaining the security of a nation, is, when occasions of disagreement arise, to assume a high attitude and a fearless tone. We keep ourselves in a state of irritability, which is continually alive to occasions of offence, and he that is prepared to be offended, readily finds offences. . . . So well, indeed, is national irritability known to be an efficient cause of war, that they who, from any motive, wish to promote it, endeavour to rouse the temper of a people by stimulating their passions, just as the boys in our streets stimulate two dogs to fight. These persons talk of insults, or the encroachments, or the contempts of the destined enemy, with every artifice of aggravation ; they tell us of foreigners who want to trample upon our rights, of rivals who ridicule our power, of foes who will crush, and of tyrants who will enslave us. They pursue their object, certainly by efficacious means ; they desire war, and therefore irritate our passions ; and when men are angry, they are easily persuaded to fight.' ¹

¹ Dymond, *Essays on the Prin. of Morality*, essay iii. ch. xix ; De Félice, *Droit de la Nat.*, &c., tome ii. lec. xvi.

CHAPTER XIV

SETTLEMENT OF INTERNATIONAL DISPUTES

1. Duty of moderation in international disputes—2. Two classes of means for their settlement—3. Amicable accommodation—4. Compromise—5. Mediation—6. Arbitration—7. Rejection of offers of mediation—8. Conferences and congresses—9. Retortion—10. Retaliation—11. Nature of reprisals—12. General and special reprisals—13. Positive and negative reprisals—14. Pacific blockade—15. Seizure of the thing in dispute—16. Necessity of proving title before seizure—17. Reprisals upon persons—18. Seizure and punishment of the individuals offending—19. If the government of the offenders assume their acts—20. Case of the 'Caroline'—21. Decision of the New York court—22. Opinions of American writers—23. Opinions of European publicists—24. Embargoes of property found within territory of injured State—25. General effect of reprisals, seizures, and embargoes—26. Sir William Scott's opinion of the embargoes of 1803—27. Reprisals and embargoes, by whom authorised—28. In general, not in favour of foreigners—29. May be in favour of domiciled aliens—30. The *Jus Angariæ*—31. International arbitration.

§ 1. THE precepts of morality, as well as the principles of public law, by which human society is governed, render it obligatory upon a State, before resorting to arms, to try every pacific mode of settling its disputes with others, whether such disputes arise from rights denied or injuries received. This moderation is the more necessary, as it not unfrequently happens that what is at first looked upon as an injury or an insult, is found, upon a more deliberate examination, to be a mistake rather than an act of malice, or one designed to give offence. Moreover, the injury may result from the acts of inferior persons, which may not receive the approbation of their own government. A little moderation and delay in such cases may bring to the offended party a just satisfaction ; whereas rash and precipitate measures often lead to the shedding of much innocent blood.

§ 2. The different modes of terminating disputes between independent States, short of actual war, are divided into two classes : first, *amicable*, or measures taken *viâ amicabili* ; and second, *forcible*, or measures taken *viâ factâ*. The *amicable*

Duty of
moderation in
international
disputes

Modes of
settlement

modes or measures have been variously divided by publicists ; the division most generally adopted is, into accommodation, compromise, mediation, arbitration, and conference. The *forcible* modes or measures are commonly known as retortion, retaliation, reprisal, seizure, and embargo. These divisions are, perhaps, not the most natural, nor are the lines of distinction between them always obvious or easily drawn. Nevertheless, as they have been adopted by writers of authority, and as these several terms are frequently used in works on international law, and require to be defined, we shall proceed to discuss each one separately.

**Amicable
accommodation**

§ 3. *Amicable accommodation* is where each party candidly examines the subject of dispute, with a sincere desire to preserve peace, by doing full justice to the other. In such cases, all doubtful points of etiquette will be yielded, and all uncertain and imaginary rights will be voluntarily renounced in order to effect an amicable adjustment of differences. If no compromise of the right in dispute can be effected, the question will be avoided by the substitution of some other arrangement which may be mutually satisfactory. Such conduct is worthy of great and magnanimous nations ; weaker States seldom act with so much moderation.¹

¹ Among the differences between States which have been settled by mutual concession or by amicable means, without recourse to war, may be included the adjustment, by the treaty of Washington, in 1842, of the then differences between the United States and Great Britain, with respect to the right claimed by the latter to visit the vessels of the former in search of slavers on the coast of Africa ; also the question between Great Britain and the United States with regard to the alleged right of subjects of the United States to fish on the banks of Newfoundland, in the Gulf of St. Lawrence, and other places where subjects of Great Britain were wont to fish before the recognition of the independence of the United States. In this matter also an amicable arrangement was made between the two countries by treaties in 1818, in 1854, and in 1871 (see *Parl. Papers*, 1878, vol. 80). Also the dispute between the same countries in 1850 concerning the protectorate exercised by Great Britain over the Mosquito Indians of Central America, ending in the treaty of 1859 between Great Britain and Honduras, whereby the country of the Mosquito Indians was recognised as belonging to Honduras, and the British protectorate ceased (see *Parl. Papers*, 1860, vol. 68). The claims of the United States concerning the Oregon territory in 1844, on the ground of priority of discovery, were settled by the treaty of 1846, providing that the boundary line between the British and United States territory should be continued westward, along the forty-ninth parallel of north latitude, to the middle of the channel separating the continent from Vancouver's Island, and thence southward through the middle of the channel and of Fucas' Straits to the Pacific Ocean. This treaty, however, necessitated subsequent reference to the arbitration of the Emperor of Germany, in 1871,

§ 4. *Compromise* is where the two parties, without attempting to decide upon the justice of their conflicting pretensions, agree to recede on both sides, and either to divide the thing in dispute, or to indemnify the claimant who surrenders his share to the other. As examples of compromise, we may refer to the negotiations terminating in the treaty of 1842, by which the Maine boundary question was satisfactorily adjusted, and to the negotiations terminating in the treaty of 1846, by which the Oregon difficulty was formally disposed of. Accommodation is a particular kind of compromise, and has therefore been deemed by some to be improperly classed as a distinct measure.¹

§ 5. *Mediation* is where a common friend interposes his good offices to bring the contending parties to a mutual understanding. As this friend acts the part of a conciliator, rather than a judge, he may, while favouring the well-founded claims of one party, seek to induce him to relax something of his pretensions, if necessary, in order to secure peace. The mediator is essentially different from the arbitrator, although he frequently assumes the latter office also; he does not

as to whether the south boundary line should pass through the Rosario Straits or the Canal de Haro (see p. 173). In the case of Delagoa Bay disputes took place between Great Britain and Portugal, with regard to their territory, from 1823 to 1872. In that year the matter was referred to the President of the French Republic, who decided in favour of Portugal. (See *Parl. Papers*, 1875, vol. 83.)

A dispute occurred between Great Britain and Spain in 1790, relative to the Nootka Sound, on the North-Western coast of America, in the course of which two Spanish ships of war captured two English vessels off Nootka Sound, in support of their claim that all the coast to the north of Western America, on the side of the South Sea as far as beyond Prince William's Sound, in the 61st degree, belonged to them. The crew of these vessels had landed and built on the coast. The Viceroy of Mexico restored the vessels; but Great Britain could not suffer so important a question to remain in abeyance. After prolonged negotiations, it was finally settled by a convention between Great Britain and Spain, October 28, 1790, that the buildings and tracts of land in the use of the two captured vessels should be restored to them; that reparation should be made for all violence committed by the subjects of either nation; that British subjects should not navigate in the Pacific Ocean or South Seas within ten leagues of any coast occupied by Spain; that there should be free trade for both nations in all parts of the north-western coasts, or islands adjacent, to the north of the coast occupied by Spain, where the subjects of either Power might hold settlements; no settlements to be formed in such parts of the eastern and western coasts of South America or islands as were situated to the south of the same, which were occupied by Spain, but the respective subjects were to be at liberty to land and build temporary huts for the purpose of fishery.

¹ *U. S. Statutes at Large*, vol. viii. p. 582, &c.

decide upon any of the matters in dispute, but merely seeks to reconcile conflicting opinions, and to moderate adverse pretensions. By thus calming the minds of the disputants, and disposing them to a reasonable accommodation or compromise, the mediator may often avert the evils and calamities of a resort to war. The task is a very delicate one, and the office of mediator requires great integrity and strict impartiality, for unless he possess these qualities in a pre-eminent degree, his efforts will not be likely to bring about the desired reconciliation of the disputants. Hubner deems it incumbent, upon neutrals generally, to act the part of mediators, in order to prevent, if possible, the breaking out of war. But Galiani is of opinion that, although the post of mediator may be accepted, the office is rather to be avoided than sought, on account of the danger to the mediator of compromising his neutrality. Phillimore prefers the Christian principle of Hubner to the more safe expediency of Galiani, but adds that 'much must depend upon the subject of dispute, the character of the disputants, and upon the position and authority of the State which tenders the good offices.'¹ The termination of the 23rd Protocol of the Treaty of Paris, 1856, is as follows:—'Whereupon the Plenipotentiaries (*i.e.*, of Austria, France, Great Britain, Prussia, Russia, Sardinia, Turkey) do not hesitate to express, in the name of their Government, the wish that States between which any serious misunderstanding may arise should, before appealing to arms, have recourse, as far as circumstances might allow, to the good offices of a friendly Power. The Plenipotentiaries hope that the Governments not represented at the Congress will unite in the sentiment which has inspired the wish recorded in the present Protocol.'²

¹ Phillimore, *On Int. Law*, vol. iii. § 4; Hubner, *De la Saisie des Bâtiments Neut.*, tome i. pt. i. ch. ii. § 11; Galiani, *De Doveri dei Principi Neut.*, ch. ix. p. 162.

² England appealed to both France and Prussia, in 1870, when war was imminent between those two countries, to refer the difference to a friendly Power before having recourse to arms, agreeably to the above Protocol. France replied that she appreciated the utility of the rule, but reminded Great Britain of the reserve made on the subject and recorded in the same Protocol, viz. :—'Que le vœu exprimé par le Congrès ne saurait en aucun cas opposer des limites à la liberté d'appréciation qu'aucune Puissance ne peut aliéner dans les questions qui touchent à sa dignité.' She further explained that, much as she might be inclined to accept the good offices of a friendly Power, the refusal of the King of Prussia to give

§ 6. *Arbitration* is where the decision of a dispute is left to arbitrators chosen by common agreement. If the contending parties have agreed to abide by the decision of these referees, they are bound to do so, except in cases where the award is obtained by collusion, or is not confined within the limits of the submission. It is usual to specify, in the agreement to arbitrate, the exact questions which are to be decided by the arbitrators, and if they exceed these precise bounds and pretend to decide upon other points than those submitted to them, their decision is in no respects binding. Thus, the award of the king of the Netherlands, on reference by treaty, in 1827, of the question of the North-Eastern boundary of the United States, not being a decision of the question submitted to him, but a proposal for a compromise, was not regarded as binding either upon the United States or Great Britain, and was rejected by both, the dispute being afterward amicably settled by the parties themselves.¹

The following rules, mostly derived from the Civil law, have been applied to international arbitrators, where not otherwise provided in the articles of reference. If there be an uneven number, the decision of a majority is conclusive. If there be only two, and they differ in opinion, they cannot call in a third as umpire. The arbitration is dissolved by the death of any one of the referees. A decision once formally delivered cannot be reconsidered without a new agreement, for, when the opinion is delivered, the arbitration is *functus officio*. The arbitrators do not guarantee the execution of their award, and have no power to enforce it. Where the guarantee which she was obliged to ask for, in order to prevent dynastic combinations dangerous to her safety and the care of her dignity, prevented her from taking any other course than that which she had adopted. (*Parl. Papers*, 1870.)

It is to be observed that, although the Protocol does not contain any binding stipulations, it affords to Powers who are willing to appeal to it, an honourable and dignified means of avoiding war.

¹ By the Treaty of Washington, May 8, 1871, Great Britain and the United States agreed to refer the questions in dispute between them to arbitration. For details of the arbitration see vol. ii. ch. xxiv. § 13.

The dispute between Germany and Spain with regard to the Caroline Islands was referred by those Powers to Pope Leo XII. in 1885. The Note containing the Pope's decision recommended those Powers to renew their direct negotiation with each other, Germany recognising the sovereign rights of Spain over the Pellew and Caroline Archipelagoes, and accepting in return the liberty of trade, navigation, and colonisation, together with the grant of coaling and naval stations. Both Governments acquiesced in this award.

the question is territorial, they cannot determine the possession as distinguished from the right of property ; for, by the law of nations, the right of property draws after it the right of possession, and the owner is not to be prejudiced by the possession of another, nor is the possessor to be disturbed in his possession till the question of ownership is determined. But this does not preclude the arbitrators from inquiring into all the circumstances of possession as part of the evidence of title. In other words, they must determine the question of ownership from which follows the right of possession, and not upon the latter as a right distinct from the former.¹

Rejection
of offers
to arbitrate

§ 7. Offers to arbitrate are not always accepted, nor is the State declining the proposal bound to give any reasons in justification for rejecting the proposal of the other disputant, or the proffer of a third power to act as arbitrator. 'It cannot,' says Phillimore, 'be laid down as a general and unqualified proposition, that it is the duty of States to adopt this mode of trial. There may, under the circumstances, be no third State willing, or qualified in all respects, for so arduous and invidious a task. Moreover, a State may feel that the contested right is one of vital importance, and one which she is not justified in submitting to the decision of any arbiter or arbiters.' By refusing either to arbitrate, or to accept an offered arbiter, we do not justly incur the suspicion that our intentions are unreasonable or our demands exorbitant. Nevertheless, if the question is not one of vital or of very serious importance, and we refuse to resort to this or any other amicable mode of settlement, such suspicion will be most likely to arise. The refusal to accept the mediation of a third party, not acting as arbiter or judge, but simply as a conciliator, would very seldom be justifiable.²

Conferences and
congresses

§ 8. *Conferences* and *international congresses* have frequently been resorted to, where differences exist between several States, and they are willing to discuss them in a spirit of conciliation, in order to bring them to an amicable settlement. They are also often resorted to after the termination

¹ Voet, *Com. ad Pandect.*, lib. iv. t. viii. ; Grotius, *De Jure Bell. ac Pac.*, lib. iii. cap. xxx. § 48 ; Puffendorf, *De Jure Nat. et Gent.*, liv. v. cap. xiii. § 6 ; Heffter, *Droit International*, § 109 ; Bello, *Derecho Internacional*, pt. i. cap. xi. § 1 ; Riquelme, *Derecho Púb. Int.*, lib. i. tit. i. cap. viii.

² Phillimore, *On Int. Law*, vol. iii. § 3.

of a general war, for the purpose of discussing and settling questions growing out of the operations of the war, and not included in the stipulations of the treaty of peace. Other States than those who are parties to the dispute, being interested in the determination of the questions submitted, or at least in the preservation of peace, are most usually invited to take part in these conferences. In order to afford a prospect of success in these deliberations, the plenipotentiaries sent to these congresses should be actuated by a sincere desire to effect a just and amicable settlement of the questions to be discussed. This, however, has not often been the case. The congresses of Cambray, in 1724, and of Soissons, in 1728, are characterised by Vattel as 'dull farces played on the political theatre, in which the principal actors were less desirous of producing an accommodation, than of appearing to desire it.' Moreover, they have generally been under the control of the great European monarchical States and republics, or the smaller sovereignties have had very little weight in their deliberations. Thus, the congresses of Paris and Vienna, in 1814 and 1815, were mainly meetings of conquerors, for dividing among themselves the spoils of conquest, and for mutually agreeing among themselves to what extent each of the greater powers should be permitted to rob its weaker neighbours. 'We know from history,' says Phillimore, 'that congresses of crowned heads have not always proved themselves to be impartial or competent tribunals of international law.' For this reason, smaller States seldom willingly submit their disputes to the decision of such tribunals. The congress of Paris, in 1856, by the justice of its acts, somewhat redeemed the general reputation of European conventions of nations. The right of such bodies to *intervene* in the affairs of States has been discussed in another place, and will again be alluded to in the chapter on the different kinds of wars.¹

¹ Vattel, *Droit des Gens*, liv. ii. ch. xviii. § 330 ; Phillimore, *On Int. Law*, vol. i. § 398 ; vol. ii. § 3. Vide *ante*, chapter iv., and *post.*, chapter xvi.

The late Lord Beaconsfield stated in the House of Lords (February 25, 1878) : 'I really cannot explain the difference between a congress and a conference, because I do not recognise any difference between them. There is a common idea that a congress consists of sovereigns, and a conference of plenipotentiaries ; but there is no foundation for this distinction. The Congress of Rastadt, at the beginning of the last century, was composed of plenipotentiaries, and so was the Congress of Paris, 1856.'

Retortion

§ 9. *Retortion*, called by some amicable retaliation, and *rétorsion de droit*, is where one nation applies, in its transactions with the other, the same rule of conduct by which that other is governed under similar circumstances. Thus, if one State should make aggressive laws respecting the property, or trade, or personal rights of the citizens of another State, the latter may retort by enacting similar laws against the citizens of the former. There is nothing in this contrary to justice and sound policy, so long as it does not degenerate into cruel and barbarous treatment of private individuals. This kind of retaliation usually follows the breach of what are called imperfect obligations, and which do not justify a resort to forcible measures.¹

Retalia-
tion

§ 10. *Retaliation*, or, as it is sometimes called, vindictive retaliation, or *retorsio facti*, is where one State seeks to make another, or its citizens, suffer the same amount of evil which the latter has inflicted upon the former. Retaliation should be limited to such punishments as may be requisite for our own safety and the good of society ; beyond this it cannot be justified. We have no right to mutilate the ambassador of a barbarous power because his sovereign has treated our ambassador in that manner, nor to put prisoners and hostages to death, and to destroy private property, merely because our enemy has done this to us ; for no individual is justly chargeable with the guilt of a personal crime for the acts of the community of which he is a member. Retaliation of this kind should be confined, as a general rule, to the individuals who have committed the violation of public law. There may be extraordinary cases which constitute an exception to this rule, but these must be judged according to the peculiar circumstances by which they are attended. 'Instances of resolutions to retaliate on innocent prisoners of war,' says Kent, 'occurred in this country during the revolutionary war, as well as during that of 1812 ; but there was no instance in which retaliation, beyond the measure of secure confinement, took place in respect to prisoners of war.' Vindictive retaliation is sometimes applied to the property of the offending State or individual, but such acts are usually of a belligerent character, and will be discussed in another place.²

¹ Martens, *Précis du Droit des Gens*, § 254 ; the 'Girolamo,' 3 *Hagg. R.*, 185 ; Polson, *Law of Nations*, sec. vi.

² Kent, *Com. on Amer. Law*, vol. i. pp. 93, 94 ; *Journals of the Con.*

§ 11. *Reprisals* are resorted to for the redress of injuries Reprisals inflicted upon the State, in its collective capacity, or upon the right of individuals to whom it owes protection in return for their allegiance. They consist in the forcible taking of things belonging to the offending State, or of its subjects, and holding them until a satisfactory reparation is made for the alleged injury. If the dispute is afterwards arranged, the things thus taken away by way of reprisal are restored, or, if confiscated and sold, are paid for with interest and damages ; but if war should result, they are condemned and disposed of in the same manner as other captured property, taken as prize of war. As reprisals bring us to the awful confines of actual war, it is proper to inquire what kind of injuries, inflicted upon the State collectively, or upon its individual members, justify a resort to so dangerous a measure of redress. It is only in cases where justice has been *plainly denied*, or *most unreasonably delayed*, that a sovereign State can be justified in authorising reprisals upon the property of another nation. Moreover, the delay must be of such a character as to render it tantamount to a denial of justice. Thus, if the claim be a national one, it must be properly demanded, and the demand refused. If it be of an individual, the claimant must first exhaust the legal remedies in the tribunals of the State from which the claim is due, and after an absolute denial of justice by such tribunals, his own government must make the demand of the sovereign authorities of the offending nation. Although the presumption of law is clearly in favour of the decisions of the lawfully constituted tribunals of a State, yet, if it is plain that justice has been administered partially, and in a different manner to the foreigner than to the subject, the government of the injured party may, notwithstanding such decision, demand justice, and if it be refused, resort to reprisals. It was a doctrine of the Roman law, that an unjust sentence does not extinguish a just debt. Subjects must submit to the authority of the law, however great the injustice ; but foreigners are under no such obligation, for their own State may, by force, compel the execution of justice on their behalf. In 1850 the British Government authorised reprisals upon the Greeks for a claim of one *Pacifico*, a British subject, who had

gress under the Confed., vol. ii. p. 245 ; vol. vii. pp. 9-147 ; vol. viii. p. 10 ; President's Messages, Dec. 7, 1813, and Oct. 28, 1814.

not first prosecuted it in the Greek tribunals. The protest of the Greek Government, and the remonstrance addressed by Russia to the British Government, contain a strong but dignified rebuke for an act which, we regret to say, was very high-handed, and manifestly in violation of international law ; moreover, the conduct of the British foreign minister was censured by a large majority of the House of Peers. The mediation of France effected an adjustment of the dispute.¹

General
and
special
reprisals

§ 12. Reprisals may be either *general* or *special*. They are *general* where one State awards to its subjects a general permission to seize the goods or persons of the offending nation upon the high seas, or wherever found without the jurisdiction of another State. They are *special* where such permission is limited to particular persons or things, or in time and place. Licences, or letters of marque, to the injured persons, authorising them to indemnify themselves upon the property of the subjects of the offending State, wherever found, have almost entirely fallen into disuse, and the term itself is now somewhat differently applied, the commissions issued to privateers in time of actual war being ordinarily denominated *letters of marque*. These are not to be confounded with *letters of reprisal*. General permission to all the citizens of one State to make reprisals upon the property and persons of all citizens of another State, is little short of actual war, although considered

¹ *Annual Reg.*, 1850, vol. xcii. pp. 211-286 ; Hansard, *Parl. Deb.*, 1150 ; De Cussy, *Droit Maritime*, liv. ii. ch. xxxvii.

The principle upon which the British Government appear to have acted was founded upon the particular circumstances of the case. It is impossible to maintain that in all cases foreigners are entitled to compensation from the Government of the country in which they may have sustained injury or loss, but it is equally impossible to maintain that there are not cases wherein, by the law of nations, compensation may be justly due to foreigners who have sustained injuries and losses in other countries. Vattel says that accidents, resulting inevitably from the measures of war, are not the subject of compensation, but that where the losses are wanton, or unnecessary for carrying out the operations, they might become so. Pacifico was a Jew, but born a British subject ; his house was broken open by a mob, his family beaten, and his whole property destroyed. He appealed to the Greek Government for 21,295*l.* 1*s.* 4*d.*, but neither obtaining that nor any reparation, he sought the protection of Great Britain, who interfered as above mentioned. This exception to the rules of international law has been excused on the ground that the local tribunals were corrupt, and that this affords considerable protection to travellers and to British commerce. The British Minister at the Court of Athens had been promised by the Greek Government a settlement of the full claim ; but the British Government agreed to refer the matter to commissioners, who awarded the Jew 150*l.*

in international law as without the pale of the rules applicable to war. The captors are not entitled to exercise the rights of war either toward the subjects of the offending State, or toward neutrals, nor are the persons or goods captured subject to the rules applicable to belligerent captures. Such matters are regulated by the law or authority authorising the reprisals, and the acts of the parties making them are to be regulated and judged of by such law or authority, but they must, in no case, be in violation of the rules of international law which may be applicable.¹

§ 13. Another division of reprisals, made by writers on public law, is, into *positive* and *negative*, or, as termed by some writers, *active* and *passive*. Reprisals are *negative* when a State refuses to fulfil a perfect obligation which it has contracted, or to permit another nation to enjoy a right which it claims; they are *positive* when they consist in seizing the persons and effects belonging to the other nation, in order to obtain satisfaction. The same rule applies to both of these classes, that is, neither should be resorted to except where the cause is manifestly just, and after all milder means have proved ineffectual. Negative reprisals, however, are, in general, less likely to produce an immediate rupture than those of a positive character. Nations are more ready to repel force than to employ it.

Positive
and
negative
reprisals

¹ Wheaton, *Elem. Int. Law*, pt. iv. ch. i. § 2; Kluber, *Droit des Gens Mod.*, § 234; Polson, *Law of Nations*, sec. vi.; Duverdy et Pistoye, *Traité des Prises*, tit. i. ch. iii. sec. iii.; and *post.* ch. xxii. § 25.

It was an ancient custom in England, when a merchant had been robbed at sea or despoiled of his property, for the King to issue a commission, under the great seal, to inquire into the robbery, and to punish the offenders, or to give damages in the case of fraud in the mercantile contract. This commission proceeded in conformity with three laws—*i.e.* the law and custom of England, the Merchant Law and the Maritime Law.—50 *Eliz.*, 3 par. 2 *Dors.* 24 de audiend. et terminand. mercatoribus super mare deprædatis.—*Pat.* 6, E. 1, m. 24 *Dors.*, the case of Will. de Dunstaple, a citizen, of Winton. *Pat.* 32 *Eliz.* 1 m. 4 pro Willielmo Perin et Domingo Perez mercatoribus.

On complaint by British merchants, about the year 1431, that the Danes had seized some cargoes of their ships, and that no Danes came to England on whom they could make reprisals, it was enacted by statute that the complainants should be entitled to letters of privy seal, and that if this should not ensure satisfaction to them, the king would otherwise provide it.

The Marine Ordinance of Louis XIV., in 1681, describes the form of letters of marque and reprisals. Louis XVI., in 1778, granted permission to the merchants of Bordeaux to make reprisals against England. This appears to be the latest French case on that subject.

**Pacific
blockade**

§ 14. Some writers have imagined a state of things, which they term 'pacific blockade;' that is to say, that one State may blockade the coasts of another State, and at the same time declare that a state of peace is maintained. The weight of authority is, however, against such an anomaly. While a blockade, as a war measure, will be internationally respected, this will not be the case with a blockade, instituted as part of a system of pacific pressure. Such blockades cannot affect neutral States; they are virtually nothing but special reprisals. Examples of so-called 'pacific blockades' are the blockade of the coast of Greece by Great Britain, France, and Russia in 1827, followed by the battle of Navarino; the proceedings in the case of *Pacifico*, above mentioned; the 'naval demonstration' at the port of Dulcigno, in 1880, of a fleet of British, German, French, Austrian, Russian, and Italian men-of-war to compel the Turkish Government to execute the treaty of Montenegro; and the blockade of the Greek ports from Cape Malea to Cape Colonna, in 1886, by the Great Powers, to induce Greece to disarm and to adopt a pacific policy.

Seizure

§ 15. *Seizure* is a general term applicable to the forcible taking of the persons or property of others, and is applied alike to reprisals and belligerent captures made in war. But, in its more restricted sense, as applied to measures taken *viâ facti*, or forcible means of settling international disputes, the term is limited to taking forcible possession of the thing in dispute, or of the persons by whom the offence is committed. The seizure of the thing in controversy is generally regarded as the preliminary step toward the commencement of a war. It is, nevertheless, neither an actual nor a formal declaration of hostilities, and there is, therefore, still a possibility of a settlement of the dispute, before entering into a state of solemn and public war. In other words, it does not make the subjects of the two States public enemies, or give to either the rights of war, as against the other, or with respect to neutrals. If, however, war should immediately follow such seizure, it would be classed as a belligerent act in all its consequences. Thus, the seizure of San Juan Island, in 1859, was, unquestionably, an act of hostility, but not, in its results, an act of war.¹

¹ Vattel, *Droit des Gens*, liv. ii. ch. xviii. § 337.

§ 16. But before taking such forcible possession, it is necessary for us to prove clearly our right to the thing in dispute, and also that we have already tried the milder modes of adjustment, for other people are not obliged to respect that title any further than we show its validity, nor will they justify us in resorting to a measure of so much rigour, and one, too, so likely to produce the most serious consequences to society, until we justify our conduct on the ground of its absolute necessity. The possessor may, therefore, remain in possession till proof is adduced to convince him that his possession is unjust. 'As long as that remains undone,' says Vattel, 'he has a right to maintain himself in it, and even to recover it by force, if he has been despoiled of it. Consequently, it is not allowable to take up arms in order to obtain possession of a thing to which the claimant has but an uncertain or doubtful right. He is only justifiable in compelling the possessor, by force of arms, if necessary, to come to a discussion of the question, to accede to some reasonable mode of decision or accommodation, or, finally, to settle the point by articles of agreement upon an equitable footing.' And where the title to the things seized seems indisputable, to attempt to gain forcible possession against the actual occupant, without first resorting to the milder modes of adjustment, is equally as objectionable as it would be to declare war under the same circumstances. Indeed, it may be regarded as even more objectionable, for the reason that such seizures are sometimes made by subordinate authorities, without consulting the war-making power of the State.¹

§ 17. It is a well-settled principle of international law, that reprisals, strictly speaking, affect the *persons* as well as the *property* of the subjects of the government against which they are granted; but, in modern times, they have been chiefly confined to *goods*. In executing the right of reprisal upon vessels, the persons of the commanders and crews are necessarily affected, although it is usual to release them immediately on bringing into port the vessel taken by way of reprisal. Nevertheless, the right of reprisal extends also to all persons of the offending nation. Vattel very justly remarks that 'as we may seize the things which belong to a nation in order to compel it to do us justice, we may equally, for the same reason,

Right to
be first
proved

Reprisals
upon
persons

arrest some of its citizens and retain them till we receive full satisfaction. This is what the Greeks called *Androlepsia*.¹ The practice of ancient times, in this respect, is not often followed by modern civilised nations, except by way of retaliation, or in the case of taking vessels on the high seas, in the manner already alluded to. It is proper to remark that all subjects of the injuring government are liable to reprisals, whether they be native, naturalised, or domiciled, but travellers and passing guests are, in general, excepted from such liability.¹

In the
punish-
ment of
individual
offenders

§ 18. But the seizure and punishment of the individuals offending is an act not unusual on the part of the offended State. Where such persons are found within the jurisdiction of the State, and they are duly tried and condemned by the lawfully constituted tribunals of the country, the act is nothing more than the ordinary and legitimate exercise of the authority of sovereign and independent States. But such offenders are sometimes seized upon the high seas, or elsewhere beyond the jurisdiction of the offended nation, an exercise of force which is justifiable only in case of offences most manifest and palpable, and where the government of the offender plainly refuses, or most unreasonably delays, to inflict punishment, to surrender the criminal, or to afford satisfaction. Such forcible seizure beyond the jurisdiction of the State is an act, not of war, but in violation of pacific international rights, and is sometimes followed by war, although more usually by a demand for explanation and satisfaction. And such diplomatic discussion, if properly conducted, will generally lead to an arrangement both of the original offence and of the consequent forcible seizure. The act, however, is, in its character, hostile.²

Where his
govern-
ment
assumes
his act

§ 19. In case the government of the offending individuals should assume the responsibility of their acts, the question arises, whether the seizing and holding of the individuals for punishment, under the municipal laws of a State, is justified by the law of nations, or whether such a proceeding is to be regarded as a reprisal or forcible seizure, hostile in its nature, and which, without explanation or satisfaction, might justify

¹ Vattel, *Droit des Gens*, liv. ii. ch. xviii. § 351 ; 'Le Louis,' 2 *Dod. R.*, 245.

² Ortolan, *Diplomatie de la Mer* liv. ii. ch. xvi. ; vide *ante*, chap. vii.

retaliation or war. The question is one of the highest importance, as its determination may lead to the most serious results. There seems to have been at one time a difference of opinion on this subject in the United States, and a conflict of jurisdiction, as claimed by the Federal authorities and State tribunals. All difficulties, however, were afterward removed by the Act of Congress passed August 29, 1842, directing the discharge of any subjects or citizens of a foreign State, and domiciled therein, confined, or in custody for any act done or omitted under the authority of a foreign State or sovereignty, the validity or effect whereof depends upon the law of nations.

§ 20. The case which gave rise to this difficulty, and to the subsequent Act of Congress, was that of Alexander McLeod, ^{Case of the 'Caroline'} a British officer, who was indicted, in 1841, for the burning of the steamboat 'Caroline,' and the killing of one Amos Durfee, a citizen of the United States, in effecting the capture of that steamboat within the jurisdiction of the State of New York, in December 1837. During the disturbances in Upper Canada, in the winter of 1837, the 'Caroline,' belonging to an American owner, had been actively engaged in conveying arms and stores from the American side of the river to the Canadian rebels, who were in possession of Navy Island. She was boarded in the night time by a party of Canadian Royalists, while she was lying, by an unexpected coincidence, without the Canadian waters, and within the jurisdiction of the territory of New York. She was set on fire, and sent down the stream, when she was precipitated over the Falls of Niagara and dashed to pieces. Durfee was killed in the affray, and several others were wounded. In the month of January 1841 McLeod, then domiciled in Canada, was suddenly arrested while engaged in some business, within the territory of the State of New York, and thrown into prison by the authorities, on the above charges. The responsibility of McLeod's acts was assumed by the British Government, as having been done by its authority and under its protection, McLeod having acted as an officer of that Government, and under the orders of his superiors. This was one of the grounds on which the discharge of McLeod from custody was demanded. The case was argued at great length and with distinguished ability on both sides, and the decision, it was thought, would

determine the question of peace or war between the United States and Great Britain.

In the correspondence between the British Ambassador, Mr. Fox, and Mr. Forsyth, the American Minister of Foreign Affairs, Mr. Fox called upon the Government of the United States to take prompt and effectual steps for the liberation of Mr. McLeod. 'It is well known,' said Mr. Fox, 'that the destruction of the steamboat "Caroline" was a public act of persons in her Majesty's service, obeying the orders of the superior authorities. That act, therefore, according to the usages of nations, can only be the subject of discussion between the two national Governments. It cannot justly be made the ground of legal proceedings in the United States against the individuals concerned, who were bound to obey the authorities appointed by their own Government.' Mr. Fox, in reply to the note of Mr. Forsyth, in which the application for the relief of McLeod was refused, 'regrets this refusal, and intimates that it and the ill-treatment of McLeod will lead to the most grave and serious consequences. He states again that the attack on the "Caroline" was made in pursuance of orders from the Colonial Authorities, and he says that the "Caroline" was a piratical vessel and was but nominally within the jurisdiction of the United States. The authorities of New York had been unable to maintain their jurisdiction at the place where the "Caroline" was attacked, or even to prevent the pirates from carrying off from that place the cannon belonging to the State. He was not authorised to state what were the views of her Majesty's Government on this subject, but he took this occasion to place his own opinion on record.'

Mr. Forsyth expressed his belief that 'Mr. Fox would not entertain this opinion if he had seen the whole evidence on the subject, which was carefully collected by the United States and communicated to the British Government. He has no more to say to Mr. Fox on the matter, and awaits the result of the demand upon Great Britain for reparation.'

McLeod was, in the month of May, removed by *habeas corpus* from Lockport to New York, in the custody of the sheriff of Niagara County. Previously to this, the following note, dated March 12, 1841, was sent by Mr. Fox to Mr. Webster, the new American Foreign Secretary:—'Her

Majesty's Government have had under consideration the subject of the arrest and imprisonment of Alexander McLeod, on a pretended charge of arson and murder; and I am directed to make known to the Government of the United States, that the British Government entirely approved of the course pursued by him. I am instructed to demand formally, and in the name of the British Government, the immediate release of Alexander McLeod, for the reason that the transaction was of a public character, planned and executed by persons duly authorised by the Colonial Government to take such measures as might be necessary for protecting the property and lives of her Majesty's subjects; and being, therefore, an act of public duty, they cannot be held responsible to the laws and tribunals of any foreign country.'

Mr. Webster replied that 'the Government of the United States entertains no doubt that, after the avowal of the transaction as a public transaction, authorised and undertaken by the British authorities, individuals concerned in it ought not, by the principles of public law and the general usage of civilised States, to be holden personally responsible in the ordinary tribunals of law for their participation in it. And the President presumes that it can hardly be necessary to say that the American people, not distrustful of their ability to redress public wrongs by public means, cannot desire the punishment of individuals when the act complained of is declared to have been an act of government itself.

. . . . The indictment against McLeod is pending in a State court, but his rights, whatever they may be, are no less safe, it is to be presumed, than if he were holden to answer in one of the courts of this Government. He demands impunity from personal responsibility, by virtue of the law of nations, and that law, in civilised States, is to be respected in all courts.' Notwithstanding this admission of the United States Government as to the principles of public law, the complicated nature of the Federal system gave the State of New York a separate claim to adjudicate in the case of McLeod, irrespective of the question of international law, and he was tried at Utica for arson and murder. A verdict of not guilty, however, terminated what might have become a very serious affair.¹

¹ The People *v.* McLeod, 25 *Wend. R.*, 483; Webster, *the Works of*,

Decision
of the
Supreme
Court of
New York
in the
case of
McLeod

§ 21. The Supreme Court of the State of New York held that a subject of a foreign State was liable to be proceeded against *individually*, and tried on an indictment in the criminal courts for *arson* and *murder*, notwithstanding the acts for which the indictment was made had been subsequently avowed by his government, and it, consequently, refused to discharge him from custody. The opinion of the court was delivered by Mr. Justice Cowen, and is of great length. So far as the question of national law is concerned, the opinion rests upon the proposition, that till war is declared by the war-making power, the officers or citizens of a foreign government, who enter our territory, are as completely obnoxious to punishment by our law as if they had been born and always resided in this country ; that while two nations are at peace with each other, the acts of hostility by individuals must be regarded as *private*, and not *public* acts, and that the courts will hold the parties *individually* responsible, notwithstanding the avowal of such acts by their government. The opinion of Mr. Justice Cowen, however, seems not to have received the approbation of the best judicial minds of his own State.

Opinions
of
American
writers

§ 22. Mr. Lee, the third attorney-general of the United States, says : ' It is as well settled in the United States as in Great Britain that a person, acting under a commission from the sovereign of a foreign nation, is not amenable for what he does, in pursuance of his commission, to any judiciary tribunal of the United States.' Judge Story, in speaking of the seizure of an American vessel and cargo by a Spanish vessel, said, that if she had a commission, it was an act of the Spanish Government ; and if she had no commission, but the act was *adopted and acknowledged by the crown, or its competent authorities*, the seizure must be considered as for the benefit of the crown, and the property, when condemned, becomes a *droit* of the Government. This view of the question is supported by the opinions of Chancellor Kent, Chief Justice Spencer, and Judge Tallmadge, of New York ; Chief Justice Gibson, of Pennsylvania ; Professor Greenleaf, of Harvard University, and numerous other distinguished jurists of the United States.¹

vol. vi. pp. 247-270 ; Phillimore, *Letter to Lord Ashburton*, 1842, pp. 27, 183 ; *Ann. Reg.* (1841), vol. lxxxiii. p. 310 ; Webster, *Diplo. and Offic. Papers*, pp. 120-40.

¹ Lee, *Opinions of U. S. Attys.-Gen.* vol. i. p. 81 ; Carrington et al. v. C. Ins. Co., 8 *Peters Rep.*, p. 522 ; Tallmadge, *Review, &c.*, 26 *W'edell Rep.*, app., 674.

§ 23. Among European writers on public law, there seems to be a very general unanimity of opinion. Vattel says that 'on all occasions susceptible of doubt, the whole nation, the individuals, and especially the military, are to submit their judgment to those who hold the reins of government.' The sovereign alone is to be held guilty for the acts of unlawful war; he alone is bound to repair the injuries, and not those who act under his authority. 'The subjects, and in particular the military, are innocent, they have acted only from a necessary obedience.' Rutherford says that even in an imperfect sort of war, 'what the members do, who act under the particular direction and authority of their nation, is, by the law of nations, no personal crime in them; they cannot, therefore, be punished, consistently with this law, for any act in which it considers them only as the instruments, and the nation as the agent.' Burlamaqui says that the mere presumption of the will of the sovereign will not be sufficient to excuse a governor, or any other officer, for committing acts of war. But if the sovereign ratify such acts, this approbation reflects back the authority of the sovereign upon the acts, and so obliges the whole commonwealth.¹

§ 24. *An embargo* is a species of reprisal upon the property of the offending nation, found within the territory of the injured State, by prohibiting the departure of vessels, or the removal of goods. An embargo may, or may not, be followed by the sequestration of the goods and property detained. If war follows, it is said to have a retroactive effect, and the detained goods are considered as the property of enemies taken in war. But if the difficulty which led to the embargo is amicably arranged, they are released upon the terms which the parties may stipulate in such arrangement. In maritime embargoes, persons as well as goods are usually seized and retained, to be subsequently released, or treated as prisoners of war, according as the embargo results in peace or solemn war. An embargo is more usually resorted to in contemplation of hostilities than as a mode of settling disputes between States. It is therefore classed by Phillimore as a measure of redress, 'midway between reprisals and war.'²

¹ Vattel, *Droit des Gens*, liv. iii. ch. ii. § 187; Rutherford, *Institutes*, b. ii. ch. ix. § 18; Burlamaqui, *Droit de la Nat. et des Gens*, tome v. part v. ch. iii. §§ 18, 19.

² Phillimore, *On Int. Law*, vol. iii. §§ 24-26; Valin, *Traité des Prises*,

Where
reprisals,
&c., are
followed
by war

§ 25. The resort to reprisals, seizures, or embargoes, or forcible means of redress between nations, may assume the character of war, in case they fail to produce the satisfaction demanded of the offending State. Such acts, as already remarked, not being positive acts of war, the effects seized are not usually condemned till the question of peace or war is finally decided. If peace should be continued, they are restored ; but if war follows, they are confiscated. ‘ Reprisals,’ says Vattel, ‘ are used between nation and nation, in order to do themselves justice when they cannot otherwise obtain it. If a nation has taken possession of what belongs to another ; if it refuses to pay a debt or repair an injury, or to make a just satisfaction, the latter may seize what belongs to the former, and apply it to its own advantage, till it obtains full payment for what is due, together with interest and damages ; or keep it as a pledge till the offending nation has made ample satisfaction. The effects thus seized are preserved, while there is any hope of obtaining satisfaction or justice. As soon as that hope disappears they are confiscated, and then the reprisals are accomplished. If the two nations, upon this ground of quarrel, come to an open rupture, satisfaction is considered as refused from the moment that the war is declared, or hostilities commenced ; and then, also, the effects seized may be confiscated.’ These remarks are more particularly applicable to *general* reprisals, although, even then, sequestration sometimes immediately follows the seizure. Where such extreme measures are resorted to it is not easy to distinguish between them and actual hostilities. But in *special* reprisals, made for the indemnification of injuries upon individuals, and limited to particular places and things, immediate confiscation is more frequently resorted to. Thus, Cromwell having made a demand on Cardinal Mazarin, during the minority of Louis XIV.,

liv. iii. tit. x. ; the ‘ Theresa Bonita,’ 4 *Rob.*, 245 ; the ‘ Boedes Lust,’ 5 *Rob.*, 245.

According to the law of England, a Sovereign may prohibit any of his subjects from leaving the realm ; a proclamation, therefore, forbidding this in general for three weeks, by laying an embargo upon all shipping in time of war, will be equally binding as an Act of Parliament, because founded upon a prior law. But a proclamation to lay an embargo in time of peace upon all vessels laden with wheat (though in the time of a public scarcity), being contrary to law, and particularly to statute 22, Car. II., c. 13, the advisers of such a proclamation, and all persons acting under it, deemed it necessary to be indemnified by a special Act of Parliament, viz., 7 George III., c. 7. (Blackst. *Comm.* ii.)

for indemnity to a Quaker, whose vessel had been illegally seized and confiscated on the coast of France, and receiving no reply within the three days specified in the demand, dispatched two ships of war to make prize of French vessels in the Channel. The vessels were seized and sold, the Quaker paid out of the proceeds the value of his loss, and the French ambassador apprised that the residue was at his service. This substantial act of justice caused neither reclamation nor war.¹

§ 26. When an embargo was laid on Dutch property in the ports of Great Britain, on the rupture of the peace of Amiens, in 1803, Lord Stowell (then Sir William Scott) announced the law applicable to such cases, as follows:—
 ‘The seizure was at first equivocal, and if the matter in dispute had terminated in reconciliation, the seizure would have been converted into a civil embargo, and so terminated. Such would have been the retroactive effect of that course of circumstances. On the contrary, if the transaction end in hostility, the retroactive effect is exactly the other way. It impresses the direct hostile character upon the original seizure; it is declared to be no embargo; it is no longer an equivocal act, subject to two interpretations; there is a declaration of the *animus* by which it is done; that it was done *hostili animo*, and it is to be considered as a hostile measure, *ab initio*, against persons guilty of injuries which they refuse to redeem by any amicable alteration of their measures. This is the necessary course, if no compact intervenes for the restoration of such property, taken before a formal declaration of hostilities.’²

§ 27. The right of granting reprisals, or of authorising seizures and embargoes, is vested in the Sovereign, or supreme power of the State. It being little short of the right to carry on war, it is usually conferred only by the war-making power of the State. This, however, is regulated by municipal law. The English statute (4 Henry V., cap. 7) declared that the king will grant marque and reprisals in due form to all that feel themselves grieved. Sir Leoline Jenkins also refers to them, as being in force at his time. But these special reprisals,

Opinion
of Lord
Stowell

Who
grants
reprisals,
&c.

¹ Vattel, *Droit des Gens*, liv. ii. ch. xviii. § 342; 2 *Ann. Reg.*, 1840.

² The ‘*Boedes Lust*,’ 5 *Rob.*, 246; the ‘*Diana*,’ 5 *Rob.*, 60. For the ‘*Silesian loan*,’ and cognate cases, see ch. xvi. § 23.

in time of peace, as has been already said, have almost entirely fallen into disuse. In case of general reprisals, the State duly authorises its officers and subjects by commissions, or by some general law or decree. Without such authority previously given, or its exercise subsequently ratified, by the supreme authority of the State, reprisals or seizures are not justified by the law of nations.¹

Not in
favour of
foreigners

§ 28. A State may authorise seizures and reprisals in favour of its own citizens, and for the redress of its own grievances, but not in favour of foreigners, or in an affair in which the nation has no concern. In 1664, England granted reprisals against the United Provinces in favour of the knights of Malta. On this subject the grand pensionary, De Witt, protested, saying: 'It is evident that no sovereign can grant or make reprisals, except for the defence or indemnification of his own subjects, whom he is, in the sight of God, bound to protect; but he never can grant reprisals in favour of a foreigner who is not under his protection, and with whose sovereign he has not an engagement to that effect, *ex pacto vel fœdere*. Besides, it is certain that reprisals cannot be granted except in case of an open denial of justice. Finally, it is also evident that, even in case of a denial of justice, he cannot empower his subjects to make reprisals until he has repeatedly demanded justice for them, and added, that in the event of a refusal, he will be obliged to grant them letters of marque and reprisal.' The Court of France strongly condemned the conduct of the British admiralty in this case, and the King of England himself testified his diapprobation of it, and gave orders for the release of the Dutch vessels which had been seized by way of reprisal.²

May be in
favour of
domiciled
aliens

§ 29. Valin is of opinion that the exception of foreigners does not apply to aliens domiciled in the country (*regnicola*), the State being bound to protect them, and to consider an injury done to them as an affront to its own sovereignty. Letters of reprisals may, therefore, issue not only to a subject

¹ Wheaton, *Elem. Int. Law*, pt. iv. ch. i. § 5; Martens, *Précis au Droit des Gens*, liv. viii. ch. ii. § 260; Emerigon, *Traité des Assurances*, ch. xii. sec. xxxv.; Bouchaud, *Théorie des Traités de Commerce*, ch. xiii. § 4; Rayneval, *Inst. du Droit de la Nat.*, &c., lib. ii. ch. xii.; Heffter, *Droit International*, § 110; Bello, *Derecho Internacional*, pt. i. ch. xi. § 3; Wynne's *Life of Sir L. Jenkins*, ii. 717.

² Bynkershoek, *De Foro Legat.*, cap. xxii. § 5; Bynkershoek, *Quæst. Jur. Pub.*, lib. i. cap. xxiv.; Garden, *De la Diplomatie*, liv. vi. sec. iii. § 2.

by birth or naturalisation, but also to a foreigner domiciled in the country. This might be inferred from the rule of international law, which subjects the property of domiciled aliens to all the contingencies of the war, they being considered, in law, as the subjects of the State in which they are domiciled. Being themselves liable to reprisals against the country of their domicile, it would seem just that they be allowed to participate in their benefits.¹

§ 30. The *Jus angariæ* is a right, denoting compulsory service. It is of great antiquity, being referred to in the New Testament (Matt. v. 41). By virtue of this right, neutral vessels may be appropriated by a belligerent, on payment of a reasonable price for compensation. It is akin to the right of *prestation*, by which neutral vessels may be hired by a belligerent, on payment of freight beforehand, and to embargo or *arrest of princes*. Hautefeuille, Masse, and other writers speak of this right as being of a belligerent character, though exercised in time of peace. During the Franco-Prussian war, 1870, the Prussian troops sank six British vessels in the river Seine. This act was defended by Prussia on the ground of military necessity, although, on the demand of the British Government, an indemnification was subsequently made.²

The 'Jus Angariæ'

§ 31. The theory of promoting peace by the establishment of public arbitrators, elected by the consent of various States, is by no means new. In the beginning of the twelfth century, Gerohus propounded his ideas for an international

Inter-national arbitration

¹ Valin, *Traité des Prises*, p. 225 ; Valin, *Ord. de la M.*, i. iii tit. x., 'Des Représailles.'

² *Parl. Papers*, 1871, vol. 71 ; *Ann. Reg.*, 1871.

By the Civil Law, a king is justified in pressing into his service or seizing ships of every description and of any nation, which may be found in his ports, for purposes of urgent necessity, but, nevertheless, a tacit condition of safe return is annexed to such seizure or pressing. By the ancient laws of England, the admiral might arrest any ship for the king's service, and after he or his lieutenant had made a return of the arrest in chancery, the owner of the ship could not plead against such return, because 'l'admiral et son lieutenant sont de record.' (Black Book, *Admir.*, fol. 28-29 and 157-158, 15 R. II., c. 3.)

Further, it is evident, from the ancient writs and patents of England, that the Admiral, the wardens of the Cinque Ports, and others, were ordered to arrest and provide ships of war and other vessels, as well as to impress mariners, and collect provisions and arms for the defence of Great Britain. (And see *Rot. Scotiæ*, 10 E. III., m. 2-17, 34.)

For a national defence in war, it is legal to pull down or injure the property of a private person : this is in accordance with the principle, *Salus populi suprema lex*. (See *Governors v. Meredith*, 4 Term R., 796.)

arbitration ; in 1693–1700 Leibnitz proposed the Pope and Emperor of Germany as joint public arbitrators ; in 1713 the Abbé St. Pierre suggested a general league of Christendom to settle international disputes ; Jeremy Bentham advocated a common tribunal for the same purpose in 1786–89 ; Kant, in 1798, proposed a fixed congress of nations to meet when called upon ; the New York Peace Society, in 1838, proposed a Board of International Arbitration ; James Mill, in 1842, wrote a treatise to the effect that delegates from different Governments should form a code, and should constitute an international tribunal ; Mr. Dudley Field, in 1872, published a plan for a court of international arbitration ; and in 1874 Dr. Goldschmidt drafted a complete code of ‘ proposed rules for international tribunals of arbitration.’ Among the schemes which approached nearest to a realisation of the theory, although they were in no sense of general application or universally accepted, was that formulated by the Powers forming part of the Armed Neutrality of 1780, who inserted, as an article of their confederacy, that the Allies should take measures to obtain for all future maritime wars a ‘ universal maritime code,’ and that of the Holy Alliance of 1815, which, inspired by the Treaty of Vienna, contemplated the advent of a golden age, under the paternal government of the three contracting monarchs ; while the Treaty of Paris of the same year (but a few months later) proposed congresses of sovereigns to arrange, without bloodshed, the future disputes of nations. But with what result ? Russia, the leader of the Armed Neutrality, was the first to violate its principles in a war with Sweden ; and, with the exception of a few improvements with respect to the slave trade, free navigation of rivers, and rules for precedence of ambassadors, which were adopted by all the Powers, parties to the Treaty of Vienna, the endeavours to secure a lasting peace became the occasion of disastrous interference with the political constitution of independent States, and the forcible propagation of a particular set of political opinions. In more recent times, the civil war in the United States of America must have tended to discourage the hopes of those who thought that a pacific settlement, through judicial forms of question, between Federal and State Governments had been permanently established. Even the elaborately organised Federation of the United States

could not withstand the shock of conflicting opinions, and the sword, not the toga, became the final arbiter.

History teaches us that the very efforts to preserve the equilibrium of power, and to protect the independence of weaker States, have led to the most bloody and destructive wars. The very efforts which have resulted in a peace, have but too frequently paved the way for a fresh war. After the battle of Actium it was believed that wars were at an end and a one and universal Empire was proclaimed. When Augustus closed the Temple of Janus revolt followed, then civil war and incursions of barbarians for over 300 years. Diocletian sought to make an enduring peace by dividing his Empire, and the associated Emperors made war among themselves for the purpose of reuniting the Empire. Constantine sought to acquire a lasting peace when he embraced Christianity, but then began the wars between orthodoxy and heresy. In fact, there is no last victory, no definite peace. Progress in the knowledge of International Law, cultivation of its principles, removal of ignorance, consolidation of treaties, opinions of jurists, must tend enormously to remove occasions of strife and to reduce the chances of war. But International Law is not yet perfectly defined. Nevertheless, hatred of warfare and the desire for a universal peace are implanted in the mind of mankind. From this idea sprang the fable of Astrea, the heavenly virgin who returned to heaven at the close of the reign of Saturn, and who is once again to revisit the earth, bestowing an endless peace, serene and pure as the light which brightens the Elysian Fields. This is the fancied epoch, toward which all our aspirations naturally lead us. And as time passes away, and when war rages and the horror of the age of iron presses on us, peace becomes the favoured goddess. We begin to detest war as an infernal monster. It is from this tendency of minds towards peace, from this ancient hope of a termination of warfare that spring the many and sincere endeavours of moralists and of philanthropists to secure the long hoped-for treasure ; but in this end of the nineteenth century, with the experience of the past to teach us, it is to be feared that universal peace and international arbitration must be pronounced to be dreams, beautiful, doubtless, but still only dreams.

CHAPTER XV

JUST CAUSES OF WAR

1. War should never be undertaken without just cause—2. Reasons and motives of a war—3. Justifiable causes of war—4. To secure what belongs, or is due, to us—5. To punish an aggression—6. To protect ourselves from a threatened danger—7. Difficulty in ascertaining the real causes of a war—8. The aggrandisement of a neighbour not a just cause of war—9. Opinion of Grotius—10. Remarks of Kent—11. The motives of a war—12. Commendable motives—13. Vicious motives—14. Pretexts, or alleged reasons—15. Unjust wars always criminal—16. Opinions of the early Fathers of the Church on war—17. Dr. Wayland's objection that war is forbidden by the Bible—18. That even defensive war is not justifiable—19. That if moral suasion fail to prevent war, we must suffer the evil—20. That war is necessarily injurious to public morals—21. That its expenses exceed its benefits—22. That men, being rational beings, should never resort to force—23. That war fails to accomplish its object—24. That one party is necessarily in the wrong—25. That the benefits of a war are more than counterbalanced by its evils—26. Remarks of Dr. Lieber on war.

**Wars
without
just
cause**

§ 1. 'WHOEVER,' says Vattel, 'entertains a true idea of war, whoever considers its terrible effects, its destructive and unhappy consequences, will readily agree that it should never be undertaken without the most cogent reasons. Humanity revolts against a sovereign who, without necessity, or without very powerful reasons, lavishes the blood of his most faithful subjects, and exposes his people to the calamities of war, when he has it in his power to maintain them in the enjoyment of an honourable and salutary peace. And if to this imprudence, this want of love for his people, he moreover adds injustice toward those he attacks, of how great a crime, or rather of what a series of crimes, does he not become guilty? Responsible for all the misfortunes which he draws down upon his subjects, he is, moreover, loaded with the guilt of all those which he inflicts on an innocent nation. The slaughter of men, the pillage of cities, the devastation of provinces—such is the black catalogue of his enormities. He is responsible to God, and accountable to human nature, for every

individual that is killed, for every hut that is burned down. The violences, the crimes, the disorders of every kind, attendant on the tumult and licentiousness of war, pollute his conscience, and are set down to his account, as he is the original author of them all.' The foregoing words of Vattel, remarkable for the age in which they were written, are well worthy the consideration and study of the statesmen and rulers of our own time.¹

§ 2. The reasons which determine a nation to undertake a war are divided, by publicists, into two distinct classes : those which relate to the *right* to make the war, and those which relate to the *expediency* or propriety of doing so. The former are called the *causes* of the war, and the latter the *motives* ; these causes may be *justifiable* or *unjustifiable*, and the motives may be *commendable* or *vicious*. The distinction has not always been observed by publicists and historians, and we not unfrequently find reasons alleged as *causes* of a war which were only *motives* or mere *pretexts* for undertaking it. Reasons and motives of war

§ 3. The *justifiable causes* of a war are injuries received or threatened. There must be a strong probability that the threat may be attempted to be carried into execution, as mere empty words will seldom justify us in declaring war. It is not necessary that the injury should be material or physical, as a national insult is often as injurious as the robbery of a province. The justifiable objects of a war may, therefore, be divided into three classes or sub-divisions: 1st. to secure what belongs or is due to us ; 2nd. to provide for our future safety by obtaining reparation for injuries done to us, and 3rd. to protect ourselves and property from a threatened injury. We will consider each of these classes separately.² Justifiable causes

§ 4. *First*, of wars undertaken to secure what belongs or is due to us. We have shown, in the preceding chapter, that the party in possession has a right to retain his possession till the other claimant shows a clear and valid title to the thing in dispute ; and if, before proving such title, he should attempt to oust the actual possessor by force, the latter may employ force to resist the attack. So, if the latter be removed from his possession by fraud or surprise, or violence, he may employ Wars to secure what belongs to us

¹ Vattel, *Droit des Gens*, liv. iii. ch. iii. § 24.

² Paley, *Moral and Pol. Philosophy*, b. vi. ch. xii. ; Phillimore, *On Int. Law*, vol. iii. § 49 ; Bello, *Derecho Internacional*, pt. ii. cap. i. § 3 ; Réal, *Science du Gouvernement*, tome v. ch. ii. sec. § 6.

force to recover it. The burthen of proof, in such cases, rests upon the party who makes the seizure or attack, and he is bound to show, not only that the thing seized is clearly and indisputably his, but, also, that all amicable modes of recovery, or adjustment, had been tried without effect; in fine, that justice had been absolutely denied him, and could be obtained only by a resort to war.¹

To
punish an
aggression

§ 5. *Second*, of wars undertaken to provide for our future safety, by obtaining a reparation of injuries done to us. We have stated, in a former chapter, that a sovereign State is not liable to *punishment* in the strict technical sense of that term; but that, where one State is injured or insulted by another, the former may require not only indemnity for the past, but security for the future, by making war upon the aggressor. This is regarded, in ordinary language, as a *punishment* for the offences committed, and is intended to prevent their recurrence. But, in public law, it is considered in the light of a reparation of injuries received, and as an act of self-defence in providing for future security. A war, undertaken for such a cause, must be limited to the object in view; beyond this, it is unjustifiable. It is proper to remark here, that an injury done to a citizen of the State, is an injury to the whole State.²

To
protect
us from
threat-
ened
danger

§ 6. *Third*, of wars undertaken to protect ourselves and property from a threatened injury. Self-defence is not limited to the repelling of unjust violence; if it be seriously threatened, we may resort to such forcible measures as may be necessary to prevent its occurrence. It is not required of a State that it wait till an injury is actually received, and then make war to obtain reparation; it is its duty to provide against the threatened danger, by making war, if needs be, upon the threatening party, in order to deprive him of the means of inflicting the injury.

The
theology
of war

§ 7. The causes of war are sometimes of such a mixed character, that it is difficult to distinguish between what is justifiable, and what is not. Doctors of theology teach us, that a war of defence is always lawful; but that serious, sufficient, and above all just causes are necessary to render lawful a war of offence. Such causes are the preservation of order,

¹ De Félice, *Droit de la Nat.*, &c., tome ii. lec. xxi.

² Grotius, *De Jure Bell. ac Pac.*, lib. ii. cap. xx. § 38; Rutherford, *Institutes*, b. ii. ch. ix. § 11.

the public benefit, recovery of property unjustly abstracted, repression of rebels, or defence of innocent persons.¹ Both nature and morality forbid our resorting to physical force to redress our wrongs, till we have tried the milder modes of procuring justice, without success ; therefore all the circumstances of each particular case must be taken into consideration before we can fully determine the character of the causes which induce the undertaking of such a war. Sometimes, however, the cause is single, and its character may be determined directly and without relation to the attending circumstances, or to the measures previously resorted to in order to obtain satisfaction.

§ 8. Of this class are wars undertaken simply for the purpose of weakening another State, whose power, if allowed to increase, we have good reason to believe, will be used to our injury. Here the question arises, how serious must be the danger to our own safety to constitute a justifiable cause for our taking up arms to prevent the aggrandisement of a neighbour ? This question is discussed, at considerable length, and with great clearness, by Vattel. ‘On the one hand,’ he says, ‘a State that increases her power by all the arts of good government, does no more than what is commendable ; she fulfils her duties toward herself, without violating those which she owes to other nations. The sovereign, who, by inheritance, by free election, or by any other just and honourable means, enlarges his dominions by the addition of new provinces, or entire kingdoms, only makes use of his right without injuring any person. How then can it be lawful to attack a State which, for its aggrandisement, makes use only of lawful means ? . . . On the other hand, it is but too well known, from sad and uniform experience, that predominating powers seldom fail to molest their neighbours, to oppress them, and even totally subjugate them, whenever an opportunity occurs

Against
the
aggran-
disement
of a
neigh-
bour

¹ Laym., lib. ii. t. iii. c. xii. ; Mol., t. i. d. 114 ; Dian., p. 6, t. 4, r. 3 ; and St. Thomas Aquinas, 22, qu. 40, art. i.

But a subject is morally bound to wage war at the command of his prince, without inquiry into the justice or injustice of the war, unless he is (which is hardly possible) absolutely aware of its injustice. (Lugo, d. 18 ; *De Just.*, s. i. n. 21 ; Sanchez, *Dec.*, l. vi. c. iii. n. 15 ; Salmer., *De Quint. Præc.*, c. viii. punct. 3, § i. n. 29.)

A person not bound to fight (*i.e.* a volunteer or a mercenary) should carefully inquire into the merits of a war before offering his services. (Mol., d. 113, n. 171 ; Dian., t. ii. tract. v. misc. r. 96.)

and they can do it with impunity. Europe was on the point of falling into servitude for want of a timely opposition to the growing fortune of Charles V. Is the danger to be waited for? Are we to allow the aggrandisement of a neighbour, and quietly wait till he makes his preparations to enslave us? Will it be a time to defend ourselves when we are deprived of the means? Prudence is a duty incumbent on all men, and most pointedly so on the heads of nations as being commissioned to watch over the safety of the whole people.' Having thus stated both sides of the question, he proceeds to give us the following solution. Since war is justifiable only where we have actually suffered an injury, or are visibly threatened with one, the increase of power in a neighbour cannot, alone and of itself, give us a right, under the law of nations, to take up arms in order to oppose it. But power alone does not threaten an injury, it must be accompanied by the will to do an injury, and that will must be clearly manifested, before we can resort to so terrible an expedient. If the State, receiving a formidable accession of power, has given proofs of injustice, rapacity, pride, ambition, or an imperious thirst of rule, she becomes an object of just suspicion to her neighbours, whose duty it is to stand on their guard against her. Moreover, they may demand securities, and if she refuses to give any, this may constitute additional evidence that she meditates injury. And when this design is *clearly* and *unmistakably* manifest, and all other modes of warding off the threatened danger fail, war becomes inevitable.¹

Opinion of
Grotius

§ 9. Grotius not only declares, as unjustifiable, a war undertaken through a 'fear of our neighbour's increasing strength,' without a moral certainty that such strength will be used to our injury, but is of opinion that in all dubious questions we are bound to resort to milder means to settle difficulties and remove apprehensions. He enumerates several causes which had been deemed sufficient to justify a declaration of war, and most of them as entirely unsatisfactory, and concludes that 'war is a matter of the weightiest importance, and by it the innocent suffer a great many afflictions, and, therefore, peace should be the end at which all our councils ought to aim.'²

¹ Vattel, *Droit des Gens*, liv. iii. ch. iii. §§ 42-49.

² Grotius, *De Jure Bell. ac Pac.*, lib. ii. caps. xxii., xxiii.

§ 10. The remarks of Chancellor Kent upon this question ^{Opinion of Kent} are equally just and appropriate. He adopts the opinions of Grotius, and 'condemns the doctrine, that war may be undertaken to weaken the power of a neighbour, under the apprehension that its further increase may render him dangerous. This would be contrary to justice, unless we were morally certain, not only of a capacity, but of *an actual intention* to injure us. We ought rather to meet the anticipated danger by a diligent cultivation and prudent management of our own resources. We ought to conciliate the respect and good-will of other nations, and secure their assistance, in case of need, by the benevolence and justice of our conduct. War is not to be resorted to without absolute necessity, nor unless peace would be more dangerous and more miserable than war itself.' ¹

§ 11. As has already been remarked, it is not sufficient, in the forum of conscience, that we have just grounds for war, or that its objects are justifiable; we must, also, have good and proper *motives* for undertaking it. The motives of a war are divided into two classes: 1st. *Commendable*, and 2nd. *Vicious*.² ^{The motives of a war}

§ 12. *Commendable motives* are derived from the good of the State and the protection of the people. If the motive for the war is to prevent an injury, or to repair one by obtaining a just satisfaction, or to provide for our future safety by obtaining a reparation for an injury done, or to recover a right of which we have been unjustly deprived, it is both proper and commendable. And when a war is undertaken from such a motive, and for a justifiable cause, we have not only justice on our side, but the sympathies of all good men, for ^{Commendable motives}

'Thrice is he armed who has his quarrel just.'

But although a war might be undertaken for commendable motives, the motives of its continuance may be very different. It may be commenced to prevent or repair an injury, but continued for the purposes of revenge or conquest. Thus, the Samnites had given Rome just cause of war by ravaging the lands of her allies. But when the former had offered full

¹ Kent, *Com. on Amer. Law*, vol. i. p. 48.

² Garden, *De la Diplomatie*, liv. vi. § 5; De Félice, *Droit de la Nat.*, &c., tome ii. lec. xxi.

reparation for the damages, and every reasonable satisfaction, the latter, bent on conquest, refused to accept the offers of the Samnites, or to be appeased by their submissions.¹

Vicious motives

§ 13. *Vicious motives* are not derived from the good of the State or the protection of its citizens, but from the suggestions of evil passions. Such are the motives which spring from unbridled and wicked ambition—the arrogant desire for command, the ostentation of power, the thirst for riches, the avidity of conquest—from jealousy, hatred and revenge.

Pretexts

§ 14. *Pretexts* are the reasons which are alleged in justification of a war, when the real motives are different. ‘Pretexts,’ says Vattel, ‘are at least an homage which unjust men pay to justice. He who screens himself with them, shows that he still retains some sense of shame. He does not openly trample on what is most sacred in human society ; he tacitly acknowledges that a flagrant injustice merits the indignation of all mankind.’²

Modern writers on unjust wars

§ 15. All modern ethical writers regard an *unjust* war as not only immoral, but as one of the greatest crimes—murder on a large scale. Such are all wars of mere ambition, engaged in for the purpose of extending regal power or national sovereignty ; wars of plunder, carried on from mercenary motives ; wars of propagandism, undertaken for the unrighteous purpose of compelling men to adopt certain religious or political opinions, whether from the alleged motives of ‘introducing a more orthodox religion,’ or of ‘extending the area of freedom.’ Such wars are held in just abhorrence by all moral and religious people ; and it is becoming the settled conviction of the masses of all nations, that war should be undertaken only in cases of dire necessity and after all pacific measures have been exhausted.³

Early Christians opposed to all wars

§ 16. Some of the early Fathers of the Church went so far as to adopt the principle, that war, *in any case* and *under any circumstances*, is unjustifiable, because contrary to the revealed will of God, and that all Christians were forbidden to bear arms. The consequence was that the Roman soldiers, who became converts to Christianity, deserted their flags in crowds, and some suffered martyrdom rather than continue in the

¹ Lieber, *Political Ethics*, b. vii. ch. iii. § 23.

² Vattel, *Droit des Gens*, liv. iii. ch. iii. §§ 30, 31.

³ Kent, *Com. on Amer. Law*, vol. i. p. 49.

military service. This extreme doctrine afforded the opponents of Christianity good ground for saying that it was destructive of civil government, and that a State composed of true Christians could not subsist. Moreover, it became evident that if Christians were not permitted to use arms in self-defence, they must all perish by the incursions and invasions of the barbarians. The question was referred to Saint Augustin, the most learned Father in the East. His answer was : ' If the Christian law had forbidden all wars, it would have been said to the soldiers who, in the Evangelist, asked the way of salvation, to throw away their arms and abandon the military service. But it had only been said to them : *Do violence to no man, neither accuse any falsely ; and be content with your wages.* Let those who think Christianity opposed to the State form an army of such soldiers as our doctrine requires, and then let them dare to say that it is an enemy of the republic, or rather let them confess that, always obedient, it is the salvation of the republic.' The Church gave its sanction to this doctrine, and the councils pronounced excommunication against those who deserted, even in time of peace. The various objections to war made by the earlier Fathers of the Church, have been often repeated by modern writers on moral science, and more recently Dymond, Wayland, and others, have pressed them upon the public with great zeal and eloquence. We propose to give a brief summary of these objections to war, and of the answers which have been made to them. The arguments of Dr. Wayland, which are mostly copied from Dymond's Essays, are given in brief space, and in more moderate and temperate language than that used by most of his followers. We shall copy his own words so far as our limits will permit.¹

§ 17. Dr. Wayland's first objection is, that 'all wars are contrary to the revealed will of God.' But in this assertion he assumes what is to be proved. There is no direct prohibition of war in the Bible. In the Old Testament we find war, in some cases, positively commanded ; and in the New Testa-

Dr. Way-
land's
objection

¹ Neander, *Hist. of Ch. Religion and Church*, Torrey, trans. vol. i. p. 272 ; Origenes, *Opera c. Celsum*, v. xxxiii. ; Tertullian, *Opera, De Jud.*, xix. : *De Corona*, c. xi. ; St. Augustinus, *Opera, Epist.*, pp. 136-238 ; St. Athanasius, *Opera*, lib. ii. p. 960 ; St. Basilus, *Opera, Epist. ad Amphil.*, can. viii. ; *Council of Arles*, can. iii. ; Gibbon, *Decline and Fall of the Roman Empire*, ch. xliii. ; St. Paulinus, *Opera, Epist.*, xxv.

ment there is not a word against the lawfulness of war. On the contrary, the soldier was told to be content with his wages. Again, he says: 'God commands us to love every man, alien or citizen, Samaritan or Jew, as ourselves,' and, from this, infers that inasmuch as we are to love all men as ourselves, we are forbidden, as a nation, to engage in war. To this it is answered, that we are nowhere commanded to love all men in the same degree, for Christ had his *beloved* disciple, one whom he loved pre-eminently and above all the others, though he loved the others none the less on that account. Again, this command, taken literally and as construed by Dr. Wayland, would render sinful the best affections of our nature—those which we bear for our parents, our wives and children, for our kindred and our countrymen. Moreover, the use of force to resist an attack or punish an offence, is by no means opposed to the command of love to all mankind. We resist the murderer and the robber, and we punish them for crimes and offences committed, but these acts do not imply *hate* or *revenge*. So it is in war, the soldier has no personal malice against his opponent.

Dr. Way-
land on
wars of
self-
defence

§ 18. Dr. Wayland next considers the question, whether we may engage in war for self-defence, and concludes that, to forcibly repel the attack of another nation, would be establishing the principle that it is 'for the advantage of him who lives among a community of thieves, to steal, or for him who lives among liars, to lie.' My living among thieves would not justify me in stealing, nor would it be any reason why I should neglect the security of my property, or leave the thief unpunished. Our living among nations who carry on unjust wars would not justify us in doing so, nor should it prevent us from repelling or punishing those who wage an unjust war against us. The argument used against war, equally applies against the prevention and punishment of individual offences and crimes.

Dr. Way-
land on
retalia-
tion

§ 19. Dr. Wayland admits that, however just and benevolent a nation may be, its moral character will not always protect it from the aggression of others, but he adds: 'If this method (that is, moral suasion), fail, why then let us suffer the evil.' This maxim, if applied to its full extent, would be subversive of all right, and soon place all power in the hands of the worst men in the community, and of the worst nations

that inhabit the world. Reason with the robber and murderer, and if they will not desist, why then let them take our property and the lives of our families! Reason with the foreign nations who invade our soil, and if they will not desist, why then let them destroy our government and reduce us to slavery! But says the Doctor: 'I believe the aggression, from a foreign nation, to be an intimation from God that we are disobeying the law of benevolence, and that is his mode of teaching nations their duty, in this respect, to each other. So that aggression seems to me in no manner to call for retaliation and injury, but rather, for special kindness and good-will.' This is certainly carrying the principle of non-resistance very far; we are not only to suffer the evil, but to thank the evil-doer, for thus reminding us of our forgetfulness of the law of benevolence!

§ 20. Again, it is argued that war necessarily begets immorality, and 'that the cultivation of a military spirit is injurious to the community, inasmuch as it aggravates the source of the evil, the corrupt passions of the human heart.' The correctness of this statement is denied, for war is not necessarily demoralising. Unjust war results from immoral causes, and is generally injurious in its moral effects upon society. The same may be said of unjust litigation. But suppose that all wars and all courts of justice were abolished, and nations, as well as individuals, were suffered to commit injuries with impunity, would not immorality and vice increase, rather than diminish? Few events rouse and elevate the patriotism and character of a nation more than a just and patriotic war. Such was the Dutch war of independence against the Spaniards, the German war against the aggressions of Louis XIV., the French war against the coalition of 1792, and the war of the American revolution.¹

§ 21. With respect to 'pecuniary expenditure,' it is not to be denied that wars, and the means of military defence, have cost vast sums of money; so, also, have litigation, and the means deemed requisite in all civilised countries, in all ages, for maintaining justice between individuals. If these vast sums of money are necessary to secure justice between indivi-

War
begets
immoral-
ity

Vast cost
of war

¹ Wayland, *Moral Science*, b. ii. p. ii. d. ii. ch. iv.; Dymond, *Essay on Morality*, e. iii. ch. xix.; Lieber, *Political Ethics*, b. vii. § 20; Paley, *Moral and Pol. Philosophy*, b. iii. pt. ii. ch. x.; b. vi. ch. xii.; Halleck, *Elem. Military Art and Science*, ch. i. pp. 22, 23.

duals of the same nation, can we expect that the means of international justice can be maintained without expenditure commensurate with the object in view? If we cannot rely exclusively upon the 'law of active benevolence,' for maintaining justice between brothers of the same country, can we hope that, in the present state of the world, strangers and foreigners will be more ready to comply with its requisitions?

Reason,
not force,
should
prevail

§ 22. Again, it is objected to war, that men, being rational beings, should contend with one another by argument, and not by force, as do the brutes. To this it is answered, that force properly begins only where argument ends. If he who has wronged me cannot be persuaded to make reparation, I apply to the court, that is, to legal force, to compel him to do me justice. So ought we to resort to *military* force, only when all other means fail to prevent aggression and injury. War should always be the last resort of nations, the *ultima ratio regni*.¹

War does
not
accom-
plish its
object

§ 23. But it is objected to war, that it does not accomplish the object for which it is used, because it often fails to procure a redress of grievances, or to prevent repeated and continued aggression. So does a resort to civil force, but such a resort is none the less proper and just on that account. The uncertainty of litigation is proverbial. But would any sane man say that, for this reason, all litigation and courts of justice should be abolished? In civil, as well as in military life, the innocent party is sometimes the sufferer.²

One party
in a war
must be
wrong

§ 24. But, it is said, in all wars one party must be in the wrong, and frequently the war is unjust on both sides. Precisely so in suits at law; one party is necessarily wrong, and frequently both resort to the civil tribunals in hopes of attaining unrighteous ends. But for this reason must all courts of law be abolished, and no one be allowed to resort to the civil tribunals to procure a redress of grievances? Must individuals in civil life rely solely upon the 'law of active benevolence,' for the security of their persons and property, and shall all wrong-doers and criminals go 'unwhipt of justice'? This is the legitimate consequence of the argument.³

§ 25. Again, it is said that the benefits of war are more than counterbalanced by the evils it entails, and that, 'most

¹ Hooker, *Eccles. Pol.*, b. i. § 10.

² Phillimore, *On Int. Law*, vol. iii. § 50; Burke, *Letters on a Regicide Peace*, vol. viii. p. 181.

³ Vattel, *Droit des Gens*, liv. iii. ch. iii. § 39.

commonly, the very means by which we repel a despotism from abroad, only establishes over us a military despotism at home.' Much has been said and written about *military* despotism, but we think he who studies history thoroughly, will not fail to prefer a military despotism to a despotism of mere politicians. The governments of Alexander and Charlemagne were infinitely preferable to those of the petty civil tyrants who preceded and followed them ; and there is none so blinded by prejudice as to say that the reign of Napoleon was no better than that of Robespierre, Danton, and the other 'lawyers' who preceded him, or of the Bourbons, for whom he was dethroned. We could point to numerous instances where the benefits of war have more than compensated for the evils which attended it ; benefits not only to the generations who engaged in it, but also to their descendants for long ages. Had Rome adopted the non-resistance principle when Hannibal was at her gates, we should now be in the night of African ignorance and barbarism, instead of enjoying the benefits of Roman learning and Roman civilisation. Had France adopted this principle when the allied armies invaded her territories, in 1792, her fate had followed that of Poland. If the United States had adopted this principle in 1776, what would now be the character and condition of America ?

Benefits of
war are
counter-
balanced
by its
evils

§ 26. We cannot better terminate this chapter than by quoting the following peculiarly just and appropriate remarks of Dr. Lieber, on the influence and character of war : 'The continued efforts,' he says, 'requisite for nations to protect themselves against the ever-repeated attacks of a predatory foe, may be infinitely greater than the evils entailed by a single and energetic war, which forever secures peace from that side. . . . No human mind is vast enough to comprehend in one glance, nor is any human life long enough to follow out consecutively, all the immeasurable blessings, and the unspeakable good, which have resulted to mankind from the ever-memorable victories of little Greece over the rolling masses of servile Asia, which were nigh sweeping over Europe like the high tides of a swollen sea, carrying its choking sand over all the germs of civilisation, liberty, and taste, and nearly all that is good and noble. . . . Wars have frequently been, in the hands of Providence, the means of disseminating civilisation, if carried on by a civilised people—as in the case of Alexander,

Remarks
of Dr.
Lieber

whose wars had a most decided effect upon the intercourse of men and extension of civilisation—or of rousing and re-uniting people who had fallen into lethargy, if attacked by less civilised and numerous hordes. Frequently we find, in history, that the ruder and victorious tribe is made to recover, as it were, civilisation, already on the wane, with a refined nation.

- Paradoxical as it may seem at first glance, it is, nevertheless, amply proved by history, that the closest contact, and consequent exchange of thought and produce, and enlargement of knowledge, between two otherwise severed nations, is frequently produced by war. War is a struggle, a state of suffering ; but as such, at times, only that struggling process without which—in proportion to the good to be obtained, or, as would be a better expression for many cases, to the good that is to be born—no great and essential good falls ever to the share of man. Suffering, merely as suffering, is not an evil. Our religion, philosophy, every day's experience, prove it. No maternal rejoicing brightens up a mother's eye, without the anxiety of labour.'¹

¹ Lieber, *Political Ethics*, b. vii. §§ 20, 21 ; Halleck, *Elem. Military Art and Science*, ch. i. pp. 32, 33 ; for opinions of Grotius on the subjects of this chapter, *vide his work, De Jure Bell. ac Pac.*, lib. i. ; lib. ii. caps. i. xx., and lib. iii. cap. v.

CHAPTER XVI

DIFFERENT KINDS OF WARS

1. Definition of war—2. Divisions made by military writers—3. By historians—4. By publicists—5. Wars of insurrection and revolution—6. Wars of independence—7. Wars of opinion—8. Wars of conquest—9. Civil wars—10. National wars—11. Wars of intervention—12. The preservation of the balance of power—13. Historical examples—14. Intervention of allies between Russia and Turkey in 1854—15. In internal affairs of States—16. Treaty of Paris and Congress of Vienna in 1814 and 1815—17. British views of armed intervention—18. Intervention by reason of treaty obligations—19. By invitation of the contending parties—20. Examples of this—21. To stay the effusion of blood—22. For self-defence—23. Public wars—24. Private wars—25. Mixed wars—26. Perfect and imperfect wars—27. Solemn and non-solemn wars—28. Effect of subsequent ratification—29. Lawful and unlawful wars—30. Distinction between unlawful and unjust wars—31. Individual liability for acts of hostility.

§ 1. WAR has been defined, 'A contest between States, or parts of States, carried on by force.' This definition is by some considered defective, and as excluding that class of civil wars which are sometimes carried on between families and factions which do not constitute either States or organised parts of States, like the wars of the Guelphs and Ghibelines in Italy, the guerilla wars in Spain, and the wars of factions in Mexico and South America. But a close examination into the origin and nature of these wars will show that they are, in most cases, waged by organised parts of a State, and have reference to some principle of internal organisation or party supremacy.

§ 2. Wars have been divided into different classes, according to the views and professions of those who discuss them. Military writers, generally, consider them in relation to the military operations which are carried on, and, therefore, divide them into *offensive* and *defensive* wars. But these terms are here used in a very different sense from that in which they are usually employed by political and ethical writers; for a war may be essentially defensive in its political and moral charac-

Definition
of warDivisions
by mili-
tary
writers

ter, even where we begin it, if intended to prevent an attack or invasion, which is under preparation. A nation which first incites the war is the real offender, by its aggression on the rights of others, although, as a matter of policy, it may confine itself to operations which are, in a military point of view, merely defensive. Hence wars, which are entirely offensive in their military character, are sometimes essentially defensive in their nature and origin, and *vice versa*.¹

By
historians

§ 3. But historians and publicists have generally divided wars according to their origin, objects, and effects, having reference also to the character of the parties which engage in them. Thus, historians have classified these contests, as *wars of intervention, wars of insurrection or of revolution, wars of independence, wars of conquest, wars of opinion, religious wars, national wars, and civil wars*. They have also classified them according to the general theatre of military operations, as land wars and maritime wars ; or as Asiatic, African, European, and American wars. Again, they are sometimes divided, with respect to periods of time or of history, as ancient and modern wars, or wars of antiquity, of classic history, of the middle ages, and of recent times. The exact periods of these several divisions are not definitively fixed, nor are the divisions themselves of much importance in international jurisprudence, except that it is to be remembered that the rules of international war, adopted at one period, may not be applicable to another period.²

By
publicists

§ 4. Publicists, on the other hand, have divided and classified these contests with reference to the affairs of State, the legal *status* of the parties engaged in them, and the international rights and obligations which result from them. Thus, text-writers usually classify them as public or *solemn wars, perfect wars, and imperfect wars, mixed wars, the non-solemn kind of wars*, and acts of hostility not followed by actual war, but governed by the laws of war. Such classification is of little importance, except so far as it may be necessary to distinguish between the rules applicable to particular cases. These distinctions, however, are sometimes adhered to with great tenacity, and argued with great learning in diplomatic

¹ Jomini, *Précis de l'Art de la Guerre*, ch. i. ; Halleck, *Elem. Military Art and Science*, ch. ii. p. 35.

² De Félice, *Droit de la Nat.*, tome ii. lec. xxii.

discussions of questions growing out of the hostile acts of particular States. We will now proceed to discuss these different kinds of wars, and the rights and duties peculiarly applicable to each.¹

§ 5. *Wars of insurrection and of revolution*, are generally those undertaken to gain or to regain the liberty or independence of the party or State which undertakes them, as was the case with the Americans in 1776 against England; of the Mexicans, and South American States against Spain; of the Greeks in 1821, and of the Hungarians in 1848; of the Italians in 1860, and of the Confederate States in 1861. A war of revolution is generally undertaken for the dismemberment of a State, by the separation of one of its parts, or for the overthrow and radical change of the government; while an insurrectionary war is sometimes waged for a very different purpose. Both, however, have respect to the internal affairs of the State, rather than to its external relations. They are, therefore, in one sense civil wars, and are governed by the same general rules which are applied to that class of wars.²

§ 6. *Wars of independence* are those waged by a State against foreign dictation and control; such as the wars of Poland against Russia, of the Netherlands against Spain, of France against the several coalitions of the allied powers, of the Spanish Peninsula against France, of India against England, of Hungary against Austria, and of Turkey against Russia. The war of 1812, between the United States and England, partook largely of this character, and some judicious historians have denominated it the war of American independence, as distinguished from the war of the American revolu-

¹ Vattel, *Droit des Gens*, lib. iii. ch. i. § 2; Wheaton, *Elem. Int. Law*, pt. iv. ch. i. §§ 6, 7; Ortolan, *Diplomatie de la Mer*, liv. iii. ch. i.; Rayneval, *Inst. du Droit Nat.*, liv. iii. ch. ii.; Riquelme, *Derecho Púb. Int.*, lib. i. tit. ii. cap. vii.

² Taylor, *On Revolutions*, &c., passim. It was held in the United States, in 1863, that the act of a foreign nation in recognising the so-called Confederate States as a belligerent power, estopped its subjects from disputing the lawfulness of captures, made on the high seas, by the United States forces according to the laws of maritime warfare; but that such recognition did not determine the status of the person and property of rebels in the courts of the United States, those courts being guided in their adjudications relative to such persons and property by municipal, and not by international law. (United States v. One hundred barrels of cement, 3 *Am. Law. Reg. N.S.*, 735.)

A citizen of a State in insurrection was held in the United States to have no *locus standi* in a court of that country to contest a prize seizure. ('The D. Sargent,' *Blatchf. Pr. Cas.*, 576.)

tion, by which the revolted colonies attained the position of a distinct and separate sovereignty.¹

**Wars of
opinion**

§ 7. *Wars of opinion* have been subdivided into two classes, *political wars* and *religious wars*. As examples of the former, we may mention those which the Vendéans have sustained in support of the Bourbons, and those France sustained against the Allies, those of propagandism waged against the smaller European States by the republican hordes of the French revolution, as also the war of Italy in 1866 against Austria for the possession of Venice. As examples, we may mention the Jewish wars, the wars of Islamism, those of the Crusades and of the Reformation. Religious wars are the most cruel and bloody, and are often carried on without any regard to the rules of international law. All wars of opinion are more cruel than those resulting from principle, policy, or necessity.²

**Wars of
conquest**

§ 8. *Wars of conquest* are those undertaken for the acquisition of territory and the extension of empire, like those of the Romans in Gaul and Britain, of the English in India, Africa, and America, of the French in Egypt and Africa, of the Spaniards in America, of the Russians in Circassia and Turkey, and of Prussia and Austria against Denmark in 1866. The war of the United States against Mexico partook largely of the character of a war of conquest, at least in its prosecution. Hostilities were commenced by the Mexicans, and the Americans had suffered innumerable wrongs before the commencement of the war. And although the avowed object of the United States in engaging in the war was simply to obtain 'indemnity for the past and security for the future,' yet, as Mexico could offer no other indemnity, it was determined, from the beginning, to seize upon and retain a portion of her territory. In its essential features it was, therefore, a war of conquest. Such wars may, or may not, be justifiable, according to the circumstances under which they are undertaken.³

§ 9. *Civil wars* are those which result from hostile opera-

¹ Jomini, *Précis de l'Art de la Guerre*, ch. i.; Ingersol, *History of the Second War*; Armstrong, *Notices of the War of 1812*, vol. i. ch. i.

² Laurent, *Droit des Gens*, tome iv. liv. iv. ch. i.; Stephen, *On History of France*, lecs. xv., xvi.

³ Halleck, *Elem. Mil. Art and Science*, ch. ii. p. 36; Ripley, *Hist. War with Mexico*, vol. i.

tions, carried on between different parts of the same State, as **Civil wars** the wars of the Roses in England, of the League in France, of the Guelphs and Ghibelines in Italy, and of the factions in Mexico and South America. Wars of insurrection and revolution are, in one sense, *civil* wars ; but this term is more usually applied to those contests which are waged between rival families or factions, for party ascendancy in a State, rather than for its dismemberment, or for a radical change in its government. Each party, in such cases, is usually entitled to the rights of war as against the other, and, also, with respect to neutrals. Mere rebellions, however, are considered as exceptions to this rule, as every government treats those who rebel against its authority according to its own municipal laws, and without regard to the general rules of war which international jurisprudence establishes between sovereign States. As is shown elsewhere, every neutral State, in such a contest, must determine for itself when it will consider a party in rebellion, insurrection, revolution, or civil war, entitled to the rights of a belligerent in its international relations ; it is not necessary, to constitute a war, that both parties should be acknowledged as sovereign States. It is sufficient if one belligerent claim sovereign rights against the other, as was the case in the Civil War of the United States of America in 1861. A neutral State, therefore, recognises an insurrection under its international responsibility to the State, previously recognised as sovereign, against which the rebel or revolutionary forces wage hostilities. To recognise every such force as a legitimate belligerent, and invest it with the rights and powers which international law confers upon a sovereign State, would be both unjust and insulting to the government of the State against which the rebellion or revolution is attempted ; while, on the other hand, it might be equally unjust toward the other party, to refuse to concede to it any belligerent rights. Each case must be determined by its own peculiar circumstances, all foreign powers which wish to preserve their neutrality strictly observing the principle of non-interference.¹

¹ Jomini, *Précis de l'Art de la Guerre*, ch. i. art. ix. ; Lieber, *Political Ethics*, b. vii. § 23 ; Bello, *Derecho Internacional*, pt. ii. cap. x. § 1 ; Riquelme, *Derecho Púb. Int.*, lib. i. tit. ii. cap. xiv. The civil war in the United States and the civil war in Spain are late instances.

It was held by the district court of Massachusetts, in 1862, that the

National
wars

§ 10. *National wars* are those where the great body of the people of a State take up arms and join in the contest, like those of the Swiss against Austria and the Duke of Burgundy, of the Catalans in 1712, of the Dutch against Philip II., of the Americans against England, of the Poles and Circassians against Russia, and of the Hungarians against Austria. A war may be a war of insurrection, or revolution, or independence, and, at the same time, a national war. Where such insurgent militia are called into the field, and organised under the constituted authorities of the State, they are entitled to all the rights of war, and are subject to all its duties and responsibilities, as was the case in the war of 1876 by Servia and Montenegro against Turkey.

Wars of
intervention

§ 11. *Wars of intervention* are those where one State interferes in favour of a particular State as against others, or in favour of a particular party, sovereign, or family in a State. This intervention is divided into two classes, according as it is made with respect to the *internal* or *external* affairs of a nation. The interference of Russia in the affairs of Poland, of England in the government of India, of Austria and the allied powers in the affairs of France during the revolution, and under the empire, are examples under the first head. The intervention of the Elector Maurice of Saxony against

United States may be engaged in war and have all the rights of a belligerent without any declaration of Congress; that in such a war it would be the duty of the President to exert all his power as commander-in-chief of the army and navy to capture or destroy the enemy; that the hostilities which were commenced by the Confederates against the Federal States constituted war; that in the civil war the Confederates were at the same time belligerents and traitors, and subject to the liabilities of both; that the United States (Federal) sustained the double character of a belligerent and sovereign, and had the rights of both, their rights as belligerents being unimpaired by the fact that their enemies owed allegiance. ('The Amy Warwick,' 2 *Spr.* 123; 'The Lilla,' *ibid.* 177.) A civil war may exist, and be prosecuted on the same footing, as if those opposing the Government were foreign invaders, whenever the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts cannot be kept open. (*Prize Cases*, 2 *Black.*, 635.) No formal declaration of war by the President of the United States was necessary to render lawful the means adopted by him to repel the warlike measures of the enemy (Confederate States) in 1861. ('The Hiawatha,' *Blatchf. Pr. Cas.*) The principle that the personal character, and disposition, of an individual inhabitant of hostile territory cannot be inquired into in questions of capture applies as well in civil as in foreign wars. Hence all the people of any district that was in insurrection against the United States in the Southern rebellion were regarded as enemies, except in so far as by action of the Government itself that relation was changed. (Alexander's Cotton, 2 *Wall.*, 404.)

Charles V., of King William against Louis XIV. in 1688, of Russia and France in the Seven Years' War, of Russia again between France and Austria in 1805, and between France and Prussia in 1806, of France, Great Britain, and Sardinia between Turkey and Russia in 1854, are examples under the second head.¹

§ 12. We have pointed out in the fourth chapter the distinction between pacific mediation and armed intervention. There are, however, certain rights and duties incident to the latter which require a separate discussion. One of the most common grounds of intervention, by force, is for *the preservation of the balance of power*; that is, to prevent the dangerous aggrandisement of any one State by external acquisitions, so as to put in jeopardy the safety of others, or the general peace of nations. This right rests solely on self-defence, for no State would be justified in preventing the lawful acquisition of territory by another, unless such acquisition should directly or mediately affect its own safety. Thus Hiero, king of Syracuse, sent aid to Carthage, deeming it necessary, as Polybius tells us, 'both in order to retain his dominions in Sicily, and to preserve the Roman friendship, that Carthage should be safe, lest by its fall the remaining power should be able, without let or hindrance, to execute every purpose and undertaking. And here he acted with great wisdom and prudence, for that is never, on any account, to be overlooked, nor ought such a force ever to be thrown into one hand, as to incapacitate the neighbouring States from defending their rights against it.'²

§ 13. It was on this principle that the Italians urged the European powers to intervene against the aggrandisement of Charles VIII. of France, when he undertook the invasion and conquest of Italy. Again, it was in support of this maxim of international law, against the aggrandisements of the Emperor Charles V., that Francis I., of France, actually concluded a treaty of alliance with the Turks (the first treaty ever contracted between a European sovereign and the Porte); and that Roman Catholic France supported, with one hand, the Protestants of Germany in their long and successful opposition

¹ Phillimore, *On Int. Law*, vol. i. §§ 386 et seq.; Wheaton, *Hist. Law of Nations*, pp. 80-88.

² Phillimore, *On Int. Law*, vol. i. § 396; Hume, *Essays*, vol. ii. p. 323.

to the aggressions of the imperial power, while with the other, and that a hand of iron, she sought to crush the Protestant subjects of her own land.¹

Crimean
war of
1854

§ 14. An example of a war of external intervention is that of England and France in 1854, against Russia, in defence of European Turkey, and to prevent the aggrandisement of the empire of the Czar, by the absorption of a large portion of the Ottoman territory. Russia based her attack upon Turkey on the ground of protecting the rights of the Greek Church, but this was evidently a mere pretext and excuse. It was, on her part, virtually a war of conquest, and of national aggrandisement, and the Western powers intervened to check her vast and rapidly increasing military preponderance. Their efforts were partially successful, and postponed an event of which they had been forewarned by the sagacious and far-seeing policy of the great Napoleon. The Italian war of 1859 was, on the part of France, partly a war of intervention, and partly a war for the defence of an ally.²

The in-
ternal
affairs of
States

§ 15. The principle of the *preservation of the balance of power*³ has been resorted to as a justification for forcible intervention in the internal affairs of States, by connecting it with treaties of guarantee, and the pretended danger that internal changes in a single State might disturb a general peace. But this is seldom, if ever, a good and sufficient excuse for a resort to armed intervention in the internal affairs of another State, while it has afforded a pretext for numerous cases of international injustice and crime. Instead of preserving peace, its general tendency has been to produce wars, and to destroy what was intended to be preserved. Thus, the interference of Russia, Austria and Prussia, in the internal affairs of Poland, and the consequent spoliation of that kingdom, may be regarded as the legitimate cause of the aggressions of revolutionary France, and the wars of the consulate and empire, by which the equilibrium of Europe was entirely destroyed.

Treaty of
Paris and
Congress
of Vienna,
1814 and
1815

§ 16. The treaty of Paris, and the congress of Vienna (1814-15), sought to restore this equilibrium by the creation of large kingdoms and the absorption of small independent States. 'To effect this purpose,' says Phillimore, 'States

¹ D'Aubigné, *Hist. of the Reformation*, b. xii.

² Phillimore, *On Int. Law*, vol. i. §§ 339 et seq. ; De Cussy, *Précis Historique*, ch. xii.

³ See *ante*, chapter iv.

were, in several instances, treated simply as containing so many square miles, and so many inhabitants, little or no regard being paid to national feelings, habits, wishes, or prejudices. The annexation of Norway to Sweden, of Genoa to Sardinia, of Venice to Austria, and the diminution of the territory of Saxony, were among the instances of grievous violations of international justice afforded by this treaty, and for which the preservation of the balance of power was the pretext and excuse ; but the true and legitimate application of that principle would have been a league of protection of the greater with the smaller States. The policy which seeks to establish one principle of international law upon the ruin of others, has been, and always must be, a policy as fatal to the lasting peace of the world as the attempt to promote one moral duty, at the expense and by the sacrifice of others, is and must be fatal to the peace of an individual ; *populus jura naturæ gentiumque violans, suæ quoque tranquillitatis in posterum rescindit munimenta.*¹

§ 17. Although Great Britain was a party to this coalition, and sanctioned the principle which tainted the treaty of Vienna, yet she expressed her emphatic dissent from the application of it to the *internal* changes of existing States, at the congresses of Trappau in 1820, of Laybach in 1821, and of Vienna, in 1822, and, also, in Italian affairs in 1860. England, however, has generally supported the principle of intervention in the *external* affairs of States for the preservation of the balance of power, both in Europe and America, at least through the medium of treaty stipulations. On this ground, her military intervention in the affairs of Portugal, in 1826, was defended. And, in 1852-3, she attempted a tripartite treaty with France and the United States, to prevent the absorption, by the latter, of the Island of Cuba, an appendage of Spain, as a means of preserving the 'present distribution of power' in America.²

Views of
Great
Britain on
armed in-
tervention

§ 18. Another ground upon which wars of intervention have been attempted to be justified, is the obligations of treaty stipulations. These may have relation both to internal and to external affairs. The quadruple alliance of 1834, by which

Treaty ob-
ligations

¹ Phillimore, *suprà*.

² Phillimore, *On Int. Law*, vol. i. § 399 ; *Cong. Doc.*, 32nd Cong., 2nd Sess. Senate, *Ex Doc.*, No. 12.

England and France intervened in the affairs of Spain and Portugal, to expel Don Carlos and Don Miguel from the territories of the two kingdoms, and the intervention of the western powers of Europe, in 1854, between Turkey and Russia, are examples of both these kinds of wars. The latter, however, was more properly an intervention to preserve the balance of power, and even the former was not altogether founded on treaty obligations. Wars of intervention are to be justified or condemned accordingly as they are, or are not, undertaken strictly as the means of self-defence, and self-protection against the aggrandisements of others, and without reference to treaty obligations, for, if wrong in themselves, the stipulations of a treaty cannot make them right.¹

Interven-
tion by
invitation

§ 19. Still another ground upon which wars of intervention have been justified, is the invitation of the contending parties. We have shown in a preceding chapter that pacific mediation may, where the mediating power acts the part of *an arbitrator*, sometimes properly lead to forcible intervention. Such intervention is not confined to conquests between sovereign States, but may be applied to cases of civil war, if the State be really divided against itself, and there be two *bond fide* parties waging actual war against each other. It has well been said that no mere temporary outbreak, no isolated resistance to authority, no successful skirmish, is sufficient for this purpose ; there should be such a contest as exhibits some equality of force, and of which the issue would be, in some degree, doubtful. In most cases, therefore, some time must elapse before an internal commotion can be clothed with the character of a revolution. In case of a mere insurrection, which has not acquired the character of a revolution, the insurgents are not considered capable of negotiating with a foreign State, or of becoming a party to any agreement with respect to arbitration or foreign intervention. We have already stated that the invitation of one party to a civil war can afford no right of foreign interference, as against the other party. The same reasoning holds good with respect to armed intervention, whether between belligerent States, or between belligerent parties in the same State.

§ 20. Nevertheless the invitation of one party is often put forward, in connection with other reasons, to justify armed

¹ Phillimore, *supra*.

intervention. Thus, the aid rendered by England, under Queen Elizabeth, to the revolted Netherlands against Spain, was based, not only on the ground of invitation by the Dutch, but also on that of protecting her Protestant subjects, and of checking the overshadowing power of Philip II. The interference of Great Britain, France, and Russia in the affairs of Greece was vindicated upon three grounds, viz. : 'First, of complying with the request of one party ; secondly, of staying the effusion of blood ; thirdly, and principally, of affording protection to the subjects of other powers who navigated the Levant.'¹

Aid rendered by England to the Netherlands

§ 21. We have stated in another chapter that when a State is desolated by a protracted civil war, foreign interference, by way of pacific mediation, in order *to stay the effusion of blood*, is not only justifiable, but is sometimes a duty imposed by humanity. But will the general interests of humanity justify interference to the extent of a *war* of intervention ? 'This ground of intervention,' says Phillimore, 'urged on behalf of the general interests of humanity, has been frequently put forward, and especially in our own times, but rarely, if ever, without others of greater and more legitimate weight to support it ; such, for instance, as the danger accruing to other States from the continuance of such a state of things, or the right to accede to an application from one of the contending parties. As an accessory to others, this ground may be defensible, but, as a substantive and solitary justification of intervention in the affairs of another country, it can scarcely be admitted into the code of international law, since it is manifestly open to abuses, tending to the violation and destruction of the vital principles of that system of jurisprudence.' As stated in the preceding paragraph, this reason occupied a prominent place among those alleged to justify the intervention of the allies between Turkey and her Greek subjects, in 1827. It also, undoubtedly, had its influence with other reasons, such as the general peace of Europe and the preservation of the balance of power, in justifying the intervention of Great Britain, Austria, Russia, Prussia, and France, in the Belgian revolution of 1830.²

To stay effusion of blood

¹ *State Papers*, Greece, 1826-32, pp. 54, 55 ; Mackintosh, *Miscellaneous Works*, pp. 750 et seq. ; De Cussy, *Droit Maritime*, liv. ii. ch. xxxvii.

² Phillimore, *On Int. Law*, vol. i. §§ 394 et seq. ; *State Papers*,

Interven-
tion for
self-
defence

§ 22. These various grounds upon which wars of intervention in the internal affairs of States were formerly attempted to be justified, are now abandoned by the best modern writers on international law, and the present rule is that stated in another chapter : 'No government has a right to interfere in the affairs of another government, *except in the case where the security and immediate interests of the first government are compromised.*' But this rule may seem vague and unsatisfactory, for who is to judge when internal security and independence is so threatened as to justify a resort to armed intervention? This question must be resolved upon the general principles upon which war, in any case, is justified. There certainly could be no doubt in the case where one State establishes a form of government which is built upon professed principles of hostility to the government of every other country, and attempts, or prepares to attempt, to force its dogmas upon others, thereby disturbing the peace of nations. 'It may be admitted,' says Phillimore, 'that Venice in 1298, Great Britain in 1649, France, both in 1789 and after the succession of the Cavaignac administration in 1848, and after the last revolution in 1851, were entitled, upon the principles of national independence, and without the intervention of foreign States, to make the great changes in their respective constitutions which were effected at those periods, because such changes concerned themselves alone. Why, then, cannot the same remark be applied to the French revolution in the year 1792? The answer is to be found in the decree promulgated by the Convention on November 19, 1792.' That decree not only authorised, but ordered the generals of the French armies to render succour and assistance to the citizens of all other States who wished to recover their liberty, or who were or might be troubled (*vexés*), for the sake of liberty. This declaration was regarded as a declaration of war, of the worst and most hateful kind, and those who had hitherto remained strictly neutral, now armed for 'that long, bloody, terrible, and universal war, which shook, not only Europe, but the world, to its centre, and of which the wounds are not yet healed.' The intervention of France and the allies in the internal affairs of Spain, in 1823, was attempted to be defended upon the same

English, on Greece, 1826-32, p. 98; Hansard, *Parl. Debates*, vol. xxviii. pp. 1133-63.

grounds as that of England and the allies in the affairs of France in 1792 ; but the cases were essentially different, and the plea of self-security was evidently a pretext rather than a justifiable reason. ' England,' said Mr. Canning, ' had made war against France, not because she had altered her own government, or even dethroned her own king, but because she had invaded Genoa, Savoy, and Avignon ; because she had overrun Belgium, and threatened to open the mouth of the Scheldt in defiance of treaties ; and because she openly announced and acted upon the determination to revolutionise every adjoining State.' But Spain, in 1823, had simply changed her constitution, limiting the power of the crown. She had not declared war against others, nor had she attempted either to seize or to revolutionise the territory or governments of other States. Nevertheless, a war of intervention was determined on, on account of the alleged danger from the spread of democratic principles, and France was supported in this determination by Austria, Prussia, and Russia ; but the public voice of England was strongly opposed to the war, and although the ministry did not deem it proper to oppose this intervention by actual force, they did not fail to condemn it in the strongest terms. Lord Brougham attacked the conduct of these powers in a speech of extraordinary power and vigour. ' To judge,' said he, ' of the danger of the principles now shamelessly promulgated, let everyone read attentively, and, if he can, patiently, the notes presented by Austria, Prussia, and Russia to the Spanish Government. Can anything more absurd and extravagant be conceived ? In the Prussian note the constitution of 1812, restored in 1820, is denounced as a system which, confounding all elements and all power, and assuming only the principle of a permanent and legal opposition to the government, necessarily destroyed that central and tutelary authority which constitutes the essence of the monarchical system.' The Emperor of Russia, in terms not less strong, called the constitutional government of the Cortez, ' laws which the public reason of all Europe, enlightened by the experience of ages, has stamped with the disapprobation of the public reason of Europe.' What is this but following the example of the autocrat Catharine, who first stigmatised the constitution of Poland, and then poured her hordes to waste province after province, and finally hewed

her way to Warsaw through myriads of unoffending Poles, and then ordered a *Te Deum* to be sung for her successes over the enemies of Poland? Such doctrines, promulgated from such quarters, are not only menacing to Spain: they threaten every independent country, they are levelled at every free constitution. Where is the right of interference to stop, if these armed despots, these self-constituted judges, are at liberty to invade independent States, enjoying a form of government different from their own, on pretence of the principle on which it is founded being not such as they approve, or which they deem dangerous to the frame of society established among themselves? ¹

**Public
Wars**

§ 23. *A public war* is one carried on under the direction, or at least with the sanction, of the supreme authority of the State. 'If it is declared in form,' says Wheaton, 'or is duly commenced, it entitles both the belligerent parties to all the rights of war against each other. The voluntary or positive law of nations makes no distinction in this respect between a just and an unjust war. A war in form, or duly commenced, is to be considered, as to its effects, as just on both sides. Whatever is permitted by the laws of war to one of the belligerent parties, is equally permitted to the other.'²

**Private
Wars**

§ 24. *A private war* is one carried on by individuals, or united bodies of individuals, without the authority or sanction of the State of which they are subjects. Such contests may take place between individuals of the same State, or of different States. The first are not the objects of international law, but of the local laws and jurisdiction of the particular State. The second may or may not belong to international jurisprudence, according to the circumstances of each particular case. As has already been said, every State is, in general, responsible for the acts of its subjects while within its control and jurisdiction; so, also, is it bound to protect its subjects in all their just rights, and to procure indemnity for any wrongs that may be inflicted on them. But the acts of private individuals, whether citizens or foreigners, are, as a general rule, to be judged of and punished by the tribunals,

¹ Vide *ante*, chapter iv.; Phillimore, *On Int. Law*, vol. i. §§ 389, 390; Alison, *Hist. of Europe*, second series, ch. xii. §§ 32-40; Hansard, *Parl. Debates*, vol. viii. pp. 46, 64, 242, 890; Brougham, *The Works of*, vol. ix. p. 279; De Cussy, *Précis Historique*, ch. iv.

² Wheaton, *Elem. Int. Law*, pt. iv. ch. i. § 6.

and according to the laws, of the place where they are committed. Grotius has devoted considerable space to prove that some kinds of private war are not repugnant to the law of nature, and therefore may be lawfully waged. But his reasoning is not applicable to the present system of international jurisprudence.¹

§ 25. A contest by force between different members of the same society or State has sometimes been called a *mixed war*. Mixed wars Grotius regards such a war as *public* on the side of the established authorities, and *private* on the part of those who resist such authorities. Such a contest on the part of individuals against the established government may be a mere insurrection or rebellion, and the acts of such *individual* insurgents, or rebels, in resisting or opposing the authority of the government, may, as already stated, be punished according to the municipal law which they have violated ; but where the contest assumes the character of a *public war*, as defined and recognised by the law of nations, it is the general usage for other States to concede to both parties the rights of war, so far as regards the law of blockades, of contraband, &c. It must be remembered, however, that every insurrection or rebellion is by no means a public war, and a State which recognises it as such, does so under the responsibilities which are imposed by the laws of international comity. It should, also, be remarked that, in such cases, belligerent rights may be superadded to those of sovereignty, that is, the contending parties may exercise belligerent rights with regard to each other and to neutral powers, while, at the same time, the established government of the State may exercise its right of sovereignty in punishing, by its municipal laws, individuals of the insurgent or revolting party, as rebels and traitors.²

§ 26. Hostile collisions of States have sometimes been divided into *perfect* and *imperfect* wars. A *perfect* war is where the whole State is placed in the legal attitude of a belligerent toward another State, so that every member of the one nation is authorised to commit hostilities against every Perfect and imperfect wars

¹ Grotius, *De Jure Bell. ac Pac.*, lib. i. cap. iii. § 1 ; Bello, *Derecho Internacional*, pt. ii. cap. i. § 1 ; De Félice, *Droit de la Nature*, &c., tome ii. lec. xxii. ; Burlamaqui, *Droit de la Nat. et des Gens*, tome v. pt. iv. ch. iii.

² Grotius, *suprà* ; Vattel, *Droit des Gens*, liv. ii. ch. iv. § 56 ; Rose v. Himeley, 4 *Cranch R.*, 272.

member of the other, in every place, and under every circumstance, permitted by the general laws of war, and subject only to the limitations and exceptions prescribed by such laws. An *imperfect* war is limited as to places, persons, and things. Such was the character of the hostilities authorised by the United States against France in 1798.¹

Solemn
and non-
solemn
wars

§ 27. Grotius divides public wars into *solemn wars* and *wars non-solemn*. The former include all those which are waged under the authority of the State, and are duly commenced or declared in form. Both the authority and the formality are requisite to constitute a solemn war. 'But a public war, less solemn,' says Grotius, 'may be without those formalities (of a solemn war), and be made against private men, and have for its authority any magistrate. And, indeed, if we consider the thing without respect to the civil law, every magistrate seems to have the power of making war, as in the defence of the people entrusted to him, so, also, to exercise that jurisdiction, if violence be offered. But, since by war the whole city or State is endangered, therefore it is provided, by the laws of almost all nations, that war be not made but by the authority of him who has the sovereign power in the State. There is such a law in Plato's last book, 'De Legibus.' And by the Roman laws he was reckoned guilty of high treason, who, without commission from the prince, presumed to make war, muster soldiers, or raise an army. And the *Cornelian law*, enacted by L. Cornelius Sylla, says: 'Without commission from the people.' In the code of Justinian there is a constitution extant, made by Valentinian and Valens, thus: 'Let no man dare to raise an army without our knowledge and advice.' To this we may refer that of St. Austin: 'Natural order, accommodated to the peace of mankind, requires this, that the authority and counsel of raising war should be in the power of princes. . . . But if the danger be so pressing, that time will not allow to consult the supreme magistrate, here necessity grants an exception. L. Pinarius, governor of Enna, a Sicilian garrison, presuming on his right, upon certain information that the townsmen designed to revolt to the Carthaginians, preserved the place by putting them to death. Franciscus de Victoria has pretended to

¹ Polson, *Law of Nations*, sec. 6; Miller v. Ship 'Resolution,'
² *Dall. R.*, 21; Bas v. Tingy, 4 *Dall. R.*, 37.

transfer the right of making war to the citizens even beyond such a necessity, to revenge those injuries which the king neglects to adjust, but his opinion is justly rejected by others.'¹

§ 28. The question has sometimes arisen how far the hostile act of a subordinate officer, as, for instance, the governor of a province, is to be regarded as the act of his sovereign or State; and how far the officer is to be held individually responsible.² The most approved and reasonable doctrine is, that if the act is ratified by his government, or rather, is not disclaimed, the government is responsible; otherwise, it becomes an individual act, and the guilty party

Acts of
sub-
ordinate
officers

¹ Burlamaqui, *Droit de la Nat. et des Gens*, tome v. pt. iv. ch. iii.; Grotius, *De Jure Bell. ac Pac.*, lib. i. cap. iii. § 4.

In England it is high treason to commence warfare without authority from the King (Coke, 3 *Inst.*), unless the necessity be so immediate and extraordinary as to leave no time to obtain the royal sanction.

By the ancient law of England, war was termed *solemn* when the courts of justice were closed, and the civil magistrates were unable to do their duty. And the question was, if necessary, to be tried and determined by the judges, and not by a jury.

² In 1868, Mr. Eyre, ex-governor of Jamaica, came before the Court of Queen's Bench upon a prosecution for acts of alleged abuse and oppression, under colour of his office, as governor of the island. He was prosecuted under the 42 Geo. III., c. 85, which enacted that if any governor of a colony, or any military officer holding any station in a colony, should be guilty of any crime or offence in the exercise or execution of his office, or under colour of it, he should be liable to be tried at Westminster. There was no doubt that what he had done was done as governor of Jamaica, and that if anything was an offence, it was done under colour of his office. Lord (then Mr. Justice) Blackburn charged the grand jury that 'the legal duty, and therefore the legal responsibility, of persons in such a position varies very much according to their powers and functions . . . but the principle is the same; the officer is bound to exercise the powers which the law gives him in the manner which under the circumstances would be right, and if he fails in something he ought to do, or which the circumstances render it his duty to do, and he neglects his duty to such an extent as to amount to criminal negligence, then he will be criminally responsible.' Thirty years before, the Mayor of Bristol had been prosecuted for not having taken proper steps to put down the riots in that city, which had continued for three days, and a great part of Bristol was burnt down. Mr. Eyre's was the converse of that case; he was charged with having exceeded his duty. Under the Colonial Act, Mr. Eyre had power, in case of apprehended danger, to proclaim martial law in the sense of suspending the common law, and enabling matters to be tried by summary procedure 'such as in armies in time of war.' And he did so. 'Looking at the insurrection,' continued Lord Blackburn, 'the massacre and the efforts of the insurgent negroes to rouse the country for the purpose of insurrection, I have no hesitation in saying that not only was there no culpability in declaring martial law, but that probably the governor would have been punishable if he had not declared it.' The grand jury returned no bill. (See *Ann. Reg.*, cx., 206; *R. v. Pinney*, 3 *B. and A.*, 958; *Keeley v. Carson*, 4 *Moore P. C. R.*, 85.)

should be surrendered up for punishment. Burlamaqui says : ' A mere presumption of the will of the sovereign would not be sufficient to excuse a governor, or any other officer, who should undertake a war, *except in the case of necessity*, without either a general or a particular order.' . . . ' Whatever part the sovereign would have thought proper to act, if he had been consulted, and whatever success the war undertaken without his order may have had, it is left to the sovereign whether he will *ratify* or *condemn* the act of the minister. If he *ratifies* it, this approbation renders the war solemn, by reflecting back, as it were, an authority upon it, so that it obliges the whole commonwealth. But if the sovereign condemn the act of the governor, the hostilities committed by him ought to pass for a sort of robbery, the fault of which by no means affects the State, provided the governor is delivered up and punished according to the laws of the country, and proper satisfaction be made for the damage sustained.' ¹

Lawful
and un-
lawful
wars

§ 29. Vattel divides all hostile collisions between nations into ' two sorts of wars, *lawful* and *unlawful*.' Unlawful wars are those undertaken ' without apparent cause,' and for ' havoc and pillage,' and all which do not come under this head are classed as lawful wars. Unlawful wars are such as were waged by the ' Grandes compagnies,' which had assembled in France during the wars with the English ; armies of banditti which ranged about Europe purely for spoil and plunder. Such were the cruises of the *filibusters*, without commission, and in time of peace ; and such, in general, are the depredations of pirates. ' To the same class belong almost all the expeditions of the African corsairs, though authorised by a sovereign, they being founded on no apparent just cause, and whose only motive is the avidity of captures. I say these two sorts of war, *lawful* and *unlawful*, are to be carefully distinguished, their effects, and the rights arising from them, being very different.' ²

Unlawful
and un-
just wars

§ 30. Writers on international jurisprudence very properly distinguish between *unlawful* and *unjust* wars. Where the war is duly declared or begun, and carried on by the proper authority of the State, it is a lawful war, and, by the voluntary law of nations, is regarded as a just war so far as the bellige-

¹ Burlamaqui, *suprà* ; the People v. McCloud, 25 Wend. R., 552.

² See p. 449 ; Vattel, *Droit des Gens*, lib. iii. ch. iv. § 67.

rent rights of the parties are concerned. Vattel compares the State that carries on an unjust war to the individual who refuses to pay his honest debts, on the ground of prescription. This rule of civil law is made for the general benefit of the community, although it may at times enable the individual to offend against his duty. So of the law of nations. In order to avoid, as far as possible, the evils of human society, it is agreed to regard every lawfully declared war as just on both sides. But, says Vattel, 'we are never to forget that this voluntary law of nations, which is admitted from necessity, and to avoid greater evils, *does not give to him whose arms are unjust a genuine right, capable of justifying his conduct, and acquitting his conscience, but only the external effect of the law and impunity among men.*'¹

§ 31. It has already been shown, in speaking of seizures and reprisals, that the hostile acts of individuals, when ratified and assumed by their government, are to be regarded as the hostile acts of the State. These acts may be of the character of reprisals, or of mixed or imperfect war, or of a virtual

Indi-
vidual
liability
for acts of
hostility

¹ Vattel, *Droit des Gens*, liv. iii. ch. xii. §§ 188-192.

On August 9, 1864, Prince Bismarck addressed a note to the Prussian Minister in London, in which, alluding to the preliminaries of peace which had been signed at Vienna, he said he hoped the British Government would recognise the moderation and placability displayed by Prussia and Austria towards Denmark. To this Earl Russell replied that, 'challenged by M. de Bismarck's invitation to admit the moderation and forbearance of the great German Government, her Majesty's Government feel bound not to disguise their own sentiments upon these matters. Her Majesty's Government have indeed from time to time, as events took place, repeatedly declared their opinion that the aggression of Austria and Prussia upon Denmark was unjust, and that the war as waged by Germany against Denmark had not for its groundwork either that justice or that necessity which are the only bases on which war ought to be undertaken. Considering the war, therefore, to have been wholly unnecessary on the part of Germany, they deeply lament that the advantages acquired by successful hostilities should have been used by Austria and Prussia to dismember the Danish monarchy, which it was the object of the treaty of 1852 to preserve entire. Her Majesty's Government are also bound to remark, when the satisfaction of national feelings is referred to, that it appears certain that a considerable number—perhaps two or three hundred thousand—of the Danish population are transferred to a German State, and it is to be feared that the complaints hitherto made respecting the attempts to force the language of Denmark upon the German subjects of a Danish sovereign will be succeeded by complaints of the attempts to force the language of Germany upon the Danish subjects of a German sovereign. . . . If it is said that force has decided the question, and that the superiority of the arms of Austria and Prussia over those of Denmark was incontestable, the assertion must be admitted. But in that case it is out of place to claim credit for equity and moderation.' (See *Ann. Reg.*, cvi. 231.)

declaration and commencement of solemn war. Such acts, however, must not exceed what the laws of war have established as belligerent rights of the subjects of hostile States. For anything done in violation of the laws of war, the individual is liable to punishment. So, also, for any act within the rules of war, not authorised or assumed by his government, as the act of the State. The distinction between the two cases is manifest, and should never be lost sight of: the latter is punishable by the rules of civil law, while the former is an offence against the law of nations, punishable only by the laws and usages of war. The taking of property, and of human life, in the one case, would be robbery and murder, punishable under the local laws; while in the other case the same acts might be fully justifiable as the lawful exercise of belligerent rights under the law of nations.¹

¹ *Vide ante*, ch. xiv. ; *Opinions of U.S. Attys.-Genl.*, vol. i. p. 81 ; *Car- rington et al. v. C. Ins. Co.*, 8 *Peters R.*, 522 ; *Tallmadge Review, &c.*, 26 *Wend. R.*, app., 674 ; *Thorshaven and its Depend.*, 1 *Edw. R.*, 102 ; *Brown v. The United States*, 8 *Cranch. R.*, 132 ; *Heffter, Droit Inter- national*, § 119.

CHAPTER XVII

DECLARATION OF WAR AND ITS EFFECTS

1. By whom war is to be declared—2. Ancient modes of declaring it—3. Modern practice of unilateral declaration—4. When this may be dispensed with—5. Conditional declaration—6. Offers after declaration—7. Object of declaration in defensive war—8. Effect upon individuals—9. On commerce, contracts, &c.—10. Carrying supplies and withdrawing goods—11. Single exception to rule of non-intercourse—12. Effect upon subjects of an ally—13. Subjects of enemy in territory of belligerents—14. Laws of particular States—15. Enemy's property in territory of belligerents—16. Debts due to subjects of an enemy—17. Opinions of Kent and Wheaton—18. Distinction made by England between debts and other property—19. Her conduct towards Denmark in 1807—20. The Silesian loan—21. Commencement of war, how determined—22. How notified to neutrals—23. Effects of declaration of war on treaties—24. On local civil laws—25. Difference between military and martial law—26. Declaration of martial law—27. Court of the constable and marshal—28. Martial law on the Continent—29. Martial law in the United States—30. Suspension of *habeas corpus*—31. Power of the President of the United States.

§ 1. THE right of making war, as well as the right of authorising retaliations, reprisals, and other forcible means of settling international disputes, belongs, in every civilised nation, to *the supreme power of the State*, whatever that supreme power may be, or however it may be constituted. As States are known to each other only through their constituted authorities, so all other relations, whether peaceful or hostile, must be settled by their recognised governments. They cannot be legally changed or interfered with by individuals. But this supreme power, originally resident in the body of the nation, may be made up of different elements, which are divided and limited according to the will of the nation, and it is only from the particular institution, or fundamental laws of each State, that we are to learn where the power resides which is authorised to make war in the name of the society at large. In the ancient republics of Greece and Italy, and among the ancient Germans, it resided with the people in their collective capacity. In England, and

By whom
it is to be
declared

other monarchical governments of Europe, it is vested in the Crown. There the right of making war, which by nature subsisted in every individual, is given up by all private persons, and is vested in the sovereign power ; and this right is given up, not only by individuals, but by the entire body of people that are under the dominion of the sovereign. It would, indeed, be extremely improper, that any number of subjects should have the power of binding the supreme magistrate, and putting him, against his will, in a state of war. In the United States it is confided to the Federal legislature. Where it resides with the people and is retained by them as a portion of sovereign power, it must be exercised by them in their collective capacity as provided by constitutional law, and neither individuals, nor bodies of individuals, less than the sovereign authority of the entire State, can authorise the making of a public war. Nevertheless—as in the case of the East India Company—a subordinate or local officer may commence hostilities in certain cases, his acts being subsequently ratified by the proper authority. Whatever hostilities may be committed by private citizens, the State ought not to be affected thereby, unless it should justify their proceedings, and thereby become partner in the guilt. Such unauthorised volunteers in violence are not ranked among open enemies, but are treated like pirates and robbers, according to that rule of the Civil Law :—*Hostes hi sunt qui nobis, aut quibus nos publice bellum decrevimus : cæteri latrones aut prædones sunt.*

Ancient
modes of
declara-
tion

§ 2. It was customary, in former times, to precede hostilities by a public declaration, communicated to the enemy. This was always done by the ancient Greeks and Romans. The latter first sent the chief of the *feciales*, called the *pater-patrus*, to demand satisfaction of the offending nation ; and if, within the space of thirty-three days, no satisfactory answer was returned, the herald called the gods to witness the injustice, and came away, saying that the Romans would consider upon the measures to be adopted. The matter was then referred to the senate, and, when the war was resolved on, the herald was sent back to the frontier to make declaration in due form. Invasions, without such public notice, were looked upon as unlawful, and no nation was regarded as an enemy of the Roman people until war was thus publicly

declared against it. By such scrupulous delicacy, says Vattel, in the conduct of her wars, Rome laid a most solid foundation for her subsequent greatness. During the middle ages, and even as late as 1635, a declaration of war to the enemy, previous to beginning hostilities, was generally made, and indeed was required by the laws of honour and chivalry.¹

§ 3. But in modern times the practice of a formal declaration to the enemy has fallen into entire disuse, the belligerents limiting themselves to a public declaration within their own territories and to their own people. The latest example of a public declaration to the enemy was that of France against Spain, at Brussels, in 1735, by heralds-at-arms, according to the forms observed during the middle ages. For a long time, however, writers on public law were divided in opinion with respect to the propriety of the modern practice of commencing war without any formal declaration to the enemy. Grotius,² Puffendorf, Valin, Emerigon and Vattel think that such declaration should be made, while Bynkershoek, Heineccius and more recent writers maintain that, although such declaration may very properly be made, yet it cannot be required as a matter of right. There is nothing in international jurisprudence, as now practised, to render such formal declaration obligatory, and the present usage entirely dispenses with it. All, however, agree that there should be some manifesto, or publication, made within the territory of the State which declares the war, announcing the existence of hostilities; and such manifesto, or publication, usually sets forth the motives for commencing the war. Some such formal act, proceeding

Modern
practice

¹ Kent, *Com. on Am. Law*, vol. i. p. 53; Vattel, *Droit des Gens*, iv. iii. ch. iv. § 51.

² The reason which is given by Grotius, is not so much that the enemy may be put on his guard (which is matter rather of magnanimity than right), but that it may be certainly clear that the war is not undertaken by private persons, but by the will of the whole community, whose right of willing is in this case transferred to the supreme magistrate by the fundamental laws of society. So that in order to make a war completely effectual, it is, according to Blackstone (1 *Comm.*, ch. vii.), necessary in England that it be publicly declared and duly proclaimed by the king's authority, and, then, all parts of both the contending nations, from the highest to the lowest, are bound by it. And wherever the right resides of beginning a national war, there also must reside the right of ending it, or the power of making peace. And the same check of Parliamentary impeachment, for improper or inglorious conduct, in beginning, or conducting, or concluding a national war, is in general sufficient to restrain the ministers of the Crown from a wanton or injurious exertion of this great prerogative.

from the competent authority, seems necessary in order to announce to the people at home, and to apprise neutral nations of, the war, for their instruction and direction in respect to their intercourse with the enemy. Calvo is even of opinion that the Declaration of Paris, 1856, has rendered it obligatory on the subscribing Powers.¹ War was formally declared by England to Russia before the Crimean War, 1854; by Austria to Italy in 1866; by France to Prussia in 1870;² by Servia to Turkey in 1876; and by Turkey to Russia in 1877. Sir William Scott laid it down, in the case of the 'Eliza Ann,'³ in 1813, that war might exist without a declaration on either side; and this was followed in that of the 'Teutonia' in 1871.⁴ A French admiral appears to have acted on this theory in 1884, in commencing hostilities against China, but unhappily under circumstances which did not redound to his credit. When a declaration is made it is not material under what form such notice is given, whether by proclamation or by a mere act of the legislative branch of the government. Thus, in the war of 1812, between the United States and Great Britain, hostilities immediately commenced as soon as Congress had passed the act, without waiting to communicate the fact either to England or to neutral States.⁵

Declara-
tion some-
times
omitted

§ 4. Nevertheless, wars between the most civilised nations have been commenced and carried on without a declaration of any kind. But these instances have generally resulted from peculiar circumstances, which rendered, or seemed to render, a public declaration unnecessary or inconvenient;

¹ *Droit Intern.*, ii. p. 33.

² It is interesting to record the commencement of the hostilities in the last Franco-Prussian War. On July 19, 1870, at three o'clock in the morning, a patrol of French cavalry galloped up to the custom-house of Forsterhöhe, on the Saarbrück frontier, and carried off the frontier guard Ehme, performing his duties as a collector of customs, and the guard Roscheds, also stationed at that custom-house. After having seized the arms of these custom-house officers, and the money chest, containing, however, only a few crowns, the French patrol retired precipitately, pursued by a picket of German lancers, who had come in haste to the spot. Some shots exchanged in this meeting were without effect.

³ 1 *Dods.*, 244; see also *Prize Cases*, 2 *Black.*, 635; the 'Brillante' v. United States, 11 *Am. Law Rep.*, N.S., 334.

⁴ L.R., 4 *P.C.*, 171.

⁵ Grotius, *De Jure Bell. ac Pac.*, lib. iii. cap. iii. § 5; Wheaton, *Elem. Int. Law*, pt. iv. ch. i. § 8; Bynkershoek, *Quæst. Jur. Pub.*, lib. iii. cap. ii.; Vattel, *Droit des Gens*, liv. iii. ch. iv. §§ 51-56; Emerigon, *Traité des Assurances*, ch. xii. § 35; Heineccius, *Elementa Juris Nat. et Gent.*, lib. ii. § 198; the 'Nayade,' 4 *Rob.*, 253.

they are, therefore, exceptions to the general rule established by modern usage. Thus, the war of 1846, between the United States and Mexico, was commenced by a conflict of armed forces on the disputed territory, and without any declaration on either side ; the Congress of the United States immediately passed an Act recognising the existence of the war. The war of 1792, between France and Great Britain, was preceded by no formal declaration ; the British ambassador was withdrawn, and the French ambassador dismissed, whereupon the National Assembly of France passed a vote of war and the seizure of British property. Phillimore deems this proceeding to have been ' perfectly justifiable in point of form.' History affords other examples of the same kind. Even admitting the views of Hautefeuille, that such wars are violations of the law of nations, so far as concerns the failure to make a formal declaration, it will hardly be contended that all the belligerent acts of the parties, during the continuance of the war, are, of consequence, illegal, and violations of international jurisprudence. It is, therefore, necessary to fix a time when the war is to be regarded as regular or formal. This is no easy matter : different solutions of the question have been proposed, the most sensible of which is the rule that, in such cases, the legitimate consequences of war flow directly from the state of public hostilities, and that the effects which the voluntary law of nations attributes to solemn war date, with respect to belligerent rights, from the commencement of such hostilities, and, with respect to neutral duties, from an official announcement, or a positive knowledge, of the existence of the war.¹

§ 5. Declarations of war may be either *absolute* or *conditional*. Hostilities result at once from the former, and the two nations are regarded as belligerents from the date of the declaration. But the demand of the one power upon the other may be accompanied by a notification that hostilities will be commenced unless satisfaction upon some matter specified be obtained immediately, or within a certain limited time. In this case the war dates from the commencement of hostilities.

¹ Riquelme, *Derecho Púb. Int.*, lib. i. tit. i. cap. ix. ; Hautefeuille, *Des Nations Neutres*, tit. iii. ch. i. ; Phillimore, *On Int. Law*, vol. iii. §§ 51 et seq. ; Moser, *Versuch*, &c., b. xviii. cap. ii. § 4 ; De Cussy, *Droit Maritime*, liv. i. tit. iii. § 4 ; the ' Eliza Ann,' 1 *Dod. R.*, 247.

Offers
after
declara-
tion

§ 6. If the enemy, says Vattel, on either declaration, offers equitable conditions of peace, the war is to be suspended, for whenever justice is done all right of employing force is superseded. To these offers, however, are to be added good and sufficient securities, for we are under no obligations to suffer ourselves to be amused by empty proposals. Moreover, we have a right to demand security, not only for the principal objects for which hostilities were declared, but also for the expenses incurred in making preparations for the war. The nature of this security will depend upon the peculiar circumstances of the case, or the confidence we are willing to repose in the word of the enemy. If the war was declared for the recovery of territory unjustly withheld from us, its immediate surrender would satisfy the main object of the declaration.¹

Object of
declara-
tion in a
defensive
war

§ 7. Although Vattel insists upon the ancient rule, that the declaration of war must, in general, be communicated to the State against which it is made, he says that he who is attacked, and wages only a defensive war, need not make a formal declaration; for the state of war is sufficiently determined by the declaration or conduct of the enemy. Nevertheless, the nation which is attacked seldom omits to make such declaration, either from a sense of its own dignity, or for the information of its own subjects and of neutral States. Such recognition seems as necessary in a defensive as in an offensive war. Thus, when Sweden, in 1812, had declared war against Great Britain, and the British government had neither issued a counter-declaration nor caused any official declaration to be made to its own subjects, Sir William Scott said it might be a question of nicety to determine how far the Swedish proclamation 'would affect the rights of British subjects to carry on their accustomed intercourse with the ports of Sweden.'²

Effect on
indi-
viduals

§ 8. A war duly declared, or officially recognised, is not merely a contest between the governments of the hostile States in their political character or capacity; on the contrary, its first effect is to place every individual of the one State in legal hostility to every individual of which the other is composed, and these individuals retain the legal character

¹ Vattel, *Droit des Gens*, liv. iii. ch. iv. § 54.

² Vattel, *suprà*; the 'Success,' 1 *Dod. R.*, 133.

of enemies, in whatever country they may be found ; and they have no capacity to contract.¹ In the next place, all the property of the one State, and of each of its citizens, is deemed hostile with respect to the opposing belligerent. Very important consequences, as to the rights of persons and property, are deducible from these principles ; the limitations and modifications of this doctrine, by usage and constitutional law, will be discussed in another place.

§ 9. One of the immediate and important consequences of these principles, which has been fully confirmed by the usages of modern warfare, and by the decisions of the judicial tribunals of Europe and of the United States, is, that a declaration, or recognition, of war, effects an absolute interruption and interdiction of all commercial intercourse and dealings between the subjects of the two countries. No commercial intercourse, or pacific dealing, can lawfully subsist between the people of the powers at war, except under the clear and express sanction of the government, and without a special license. It is a well-settled doctrine, that there cannot exist, at the same time, a war of arms and a peace of commerce. It was also so decided by the Congress of the United States, during the Revolutionary war, and, again, by the Supreme Court of the United States during the war of 1812. This doctrine renders null and void all contracts with the enemy during the war ; it makes illegal the insurance of enemy's property, prohibits the drawing of bills of exchange, by an alien enemy on a subject of the adverse government, the purchase of bills on the enemy's country, or the remission and deposit of funds there, and the remission of money or bills to subjects of the enemy. All endeavours to trade with the enemy, by the intervention of third persons, or by partnerships, are equally forbidden, and no artifice can legalise any trade, communication, or contract of whatsoever character, without the express permission of the government. The subjects of the belligerent States cannot commence or carry on any correspondence or business together, and all commercial partnerships, existing between the subjects of the two parties prior to the war, are dissolved by the mere force and act of the war itself : though other contracts, existing prior to the war, are not extinguished, but the remedy is only

On commerce, &c.

¹ White *v.* Burnley, 20 *How*, 235 ; the 'Odessa,' Spink's *P.R.*, 208.

suspended, and this from the inability of an alien enemy to sue, or to sustain, in the language of the Civilians, a *persona standi in judicio*.¹

Carrying
supplies
to a
colony, &c.

§ 10. 'This strict rule,' says Kent, 'has been carried so far in the British Admiralty, as to prohibit a remittance of supplies even to a British colony during its temporary subjection to the enemy, and when the colony was under the necessity of supplies, and was only partially and imperfectly supplied by the enemy. The same interdiction of trade applies to ships of truce, or cartel ships, which are a species of neutral navigation, intended for the recovery of the liberty of prisoners of war. Such a special and limited intercourse is dictated by policy and humanity, and it is indispensable that it be conducted with the most exact and exclusive attention to the original purpose, as being the only condition upon which the intercourse can be tolerated. All trade, therefore, by means of such vessels, is unlawful, without the express consent of both the governments concerned.' A case occurred during the war of 1812, between the United States and Great Britain, and was decided by the American courts, showing the rigour of this rule of non-intercourse. A citizen of the United States had purchased a quantity of goods within British territory, a long time previous to the declaration of hostilities, and had deposited them on an

¹ Kent, *Com. on Am. Law*, vol. i. pp. 66, 68; the 'Indian Chief,' 3 *Rob.*, 22; the 'Pieter,' 4 *Rob.*, 49; the 'Franklin,' 6 *Rob.*, 127; the 'Joseph,' 8 *Cranch. R.*, 451; the 'Hoop,' 1 *Rob.*, 196. *Wolff v. Oxholm*, 6 *Maule* and § 92; and see *United States v. Boxes of Arms* (1 *Bond*, 446) as to the application of this rule to the States which joined the Southern Confederacy during the American Civil War. See also *Gay's Gold* (13 *Wall*, 358), and *United States v. Homeyer* (2 *Bond*, 217) as to the effect of the Acts of Congress, Proclamations, &c., on the same rule.

If an enemy be put in the King's peace, by means of a flag of truce, or other act of public authority, he is entitled to sue during war (*Gist v. Mason*, 1 *Term R.*, 86), and the modern practice has been to allow debts and actions to revive on the return of peace. It has been decided in the United States that war does not confiscate debts or property for the benefit of debtors or agents, but only suspends the right of action. After peace, the obligation of an agent, who has collected funds in the territory of one belligerent upon account of a resident in the other to pay over to his principal, revives (*Caldwell v. Harding*, 1 *Low*, 326). In the English courts *Wolffe v. Oxholm* (6 *M. and Sel.*, 92) decides that private debts cannot be confiscated. Where members of a partnership are belligerents, war dissolves the partnership as to future joint dealings, though not as to winding up the affairs of the firm. Thus, where a partner resided in a belligerent territory, it was held that he could not after the breaking out of the rebellion appoint an agent and give him partnership funds to purchase cotton for the firm. (*Cramer v. United States*, 7 *Cl. of Cl.*, 302.)

island near the frontier; upon the declaration of war, his agents hired a vessel to proceed to the place of deposit and bring away the goods; but, on her return, she was captured and, with her cargo, condemned as a prize of war.¹

§ 11. The only exceptions to this strict and rigorous rule of international jurisprudence, are 'contracts of necessity, founded on a state of war, and engendered by its violence.' All ransom bills come under this exception, as, also, bills of exchange drawn by a prisoner in the enemy's country for his own subsistence. In the case of a bill of exchange drawn upon England, by a British prisoner in France, for his own subsistence, and endorsed to an alien enemy, the latter was allowed to enforce it on the return of peace.²

Only
exception
to a rule
of non-in-
tercourse

§ 12. Kent says that it is equally illegal for an ally of one of the belligerents, and who carries on the war conjointly, to have any commerce with the enemy. A single belligerent may grant licenses to trade with the enemy, and dilute and weaken his own rights at pleasure, but it is otherwise when allied nations are pursuing a common cause. The community of interests, and object, and action, creates a mutual duty not to prejudice that joint interest; and it is a declared principle of the law of nations, founded on very clear and just grounds, that one of the belligerents may seize and inflict the penalty of forfeiture on the property of a subject of a co-ally engaged in a trade with a common enemy, and thereby affording him aid and comfort, whilst the other ally was carrying on a severe and vigorous warfare. It would be contrary to the implied

Effect on
subjects
of an ally

¹ Kent, *Com. on Am. Law*, vol. i. p. 66; the 'Rapid,' 8 *Cranch R.*, 155; Potts *v.* Bell, 8 *Term R.*, 548; the 'Venus,' 4 *Rob.*, 355; the 'Carolina,' 6 *Rob.*, 336; the 'Bella Giuditta,' cited, 1 *Rob.*, 147.

It was enacted by the 17 and 18 Vict. c. 123 (passed at the time of the Crimean war, 1854), that if any person within the British dominions, or any British subject in any foreign country, should wilfully or knowingly take, acquire, become possessed of, or interested in, any stocks, funds, scrip, bonds, debentures, or securities for money, which, since March 29, 1854, had been, or which, during the continuance of hostilities as aforesaid, should be created, entered into, or secured by or in the name of the Government of Russia, or any person or persons on its behalf, every person so taking, acquiring, becoming possessed of, or interested in any such stocks, funds, scrip, bonds, or debentures as aforesaid, should be guilty of a misdemeanour. This did not apply to the case of a claim on the estate of a deceased person, nor to an execution for debt, nor to an interest in a bankrupt's estate, nor to Russian Government notes used in circulation.

² Antoine *v.* Morehead, 6 *Taunton Rep.*, p. 237, and see *post.*, vol. ii. ch. xxiii.

contract in every such warlike confederacy, that neither of the belligerents, without the other's consent, shall do anything to defeat the common object. Wheaton says that no subject of an ally can trade with the common enemy in a conjoint war, without being liable to the forfeiture, in the prize courts of an ally, of his property engaged in such trade ; and that, as the rule with respect to the subjects of the belligerent State can be relaxed only by the permission of the sovereign power of the State, so the rule, with respect to the subjects of allies, can be relaxed only by the permission of the allied nations, according to their mutual agreement.¹

On sub-
jects of an
enemy in
our
territory

§ 13. One of the immediate consequences of the position in which the citizens and subjects of belligerent States are placed, by the declaration of war, is, that all the subjects of one of the hostile powers, within the territory of the other, are liable to be seized and retained as prisoners of war.² But this extreme right, founded on the positive law of nations, has been stripped of much of its rigour in modern warfare, by the milder rules resulting from the usage of nations, the stipulations of treaties, and the municipal laws and ordinances of particular States. These affect, more or less, the exercise of this extreme right of war ; but the *right* itself still remains, and may, under certain circumstances, be enforced, at the discretion of the belligerent. Bynkershoek mentions several instances arising in the seventeenth, and one as early as the fifteenth, century, of stipulations in treaties allowing foreign subjects a reasonable time to withdraw with their effects. Such stipulations, says Kent, have now become an established formula in commercial treaties.³ Emerigon considers such

¹ Kent, *Com. on Am. Law*, vol. i. p. 69 ; Wheaton, *Elem. Int. Law*, pt. iv. ch. i. § 14.

² See *post.*, vol. ii. ch. xx.

³ For example, the treaty of Breda between Great Britain and the States-General of the Netherlands, allowing the term of six months to the subjects of either party to transport their property ; that of Utrecht between Great Britain and France, similar in effect ; that of 1766 between Great Britain and Russia, re-enacted in the 12th article of the treaty of commerce between the same parties in 1797 ; and that of 1795 between Great Britain and the United States, limited to twelve years from the date thereof. De Martens gives a number of treaties, in which the right of enemy subjects to remain in a country not for a time only, but during the whole war, so long as they behave peaceably, is provided for. Among other treaties to this effect are those between Great Britain and Portugal, 1810 ; France and Brazil, 1826 ; Austria and Brazil, 1827 ; United States and Peru, 1870 ; Belgium and the Transvaal, 1876 ; and Germany and Mexico, 1882.

treaties as an affirmative of common right, or the public law of Europe. Vattel also says that the sovereign who declares war cannot detain those subjects of the enemy who are within his dominions, at the time of such declaration, and that they are to be allowed a reasonable time to withdraw, because, by permitting them to enter his territories, he tacitly promised them protection, and security for their return. The current of opinion, however, is in favour of the doctrine that the general *right* still exists as a rule of law, though its *exercise* has been limited and modified by usage and conventional law, and by municipal ordinances and regulations.¹

§ 14. In England it was provided by *Magna Charta*, that upon the breaking out of war, foreign merchants found in England, and belonging to the country of the enemy, should be attached, 'without harm to body or goods,' until it be known how English merchants were treated by the enemy. This seems to have been a common rule of equity among all the northern nations; for we learn from Stiernhook, that it was a maxim among the Goths and Swedes, *Quam legem exteri nobis posuere, eandem illis ponemus*. By the statute of 27 Edward III., c. 17, foreigners were to have convenient warning of forty days, by proclamation, to depart the realm with their goods. This statute is more definite in terms than *Magna Charta*, which has been supposed to apply only to merchants absolutely domiciled in England. The Act of Congress of July 6, 1798, authorised the President, in case of war, to direct the conduct to be observed towards subjects of the hostile nation, being aliens and within the United States, and in what case and upon what security their residence should be permitted; and provided 'for the recovery, disposal, and removal of their goods and effects, and for their departure.' This Act is, however, considerably restricted, by the decision of the Supreme Court, in the case of *Brown v. The United States*.² By the Spanish decree of February 1829, making Cadiz a free port, it was declared that, in the event of war, foreigners who had established themselves there for the purpose of commerce, becoming alien enemies by means of war, were to be allowed a proper time to withdraw,

Laws of
particular
States

¹ Kent, *Com. on Am. Law*, vol. i. p. 56; Vattel, *Droit des Gens*, liv. iii. ch. iv. § 63; Emerigon, *Traité des Assurances*, ch. xii. sec. 35; Bynkershoek, *Quæst. Jur. Pub.*, cap. ii. § 7.

² § 17, *infra*.

and their property was not to be subject to sequestration. Other nations have made similar decrees ; but, however strong the current of modern authority in favour of the milder principle, nevertheless, the ancient and stricter rule must still be regarded as the law of nations. There, however, should be a very strong case in order to justify the exercise of this extreme right, as the spirit of the age is decidedly against it. At the opening of the war of 1803, between France and Great Britain, Napoleon made prisoners of all English subjects travelling in France. The pretext for this exercise of the extreme right of war, was the capture of French vessels in the bay of Audière by the English, prior to the declaration of war, and other violations of maritime law. The law of retaliation—allowing it to be proved that the pretext be true—would hardly seem to require, or even to justify, a resort to means so unusual and odious, although within the extreme limits fixed by the ancient and severer rules of war.¹

Enemy's
property
in terri-
tory of
belli-
gerents

§ 15. What we have said of the detention of the enemy's person, also holds good with respect to the right to seize and confiscate all enemy's property, found within the territory of the other belligerent at the commencement of hostilities.² In

¹ Massé, *Droit Comm.*, liv. ii. tit. i. ch. ii. §§ 1, 2 ; Thiers, *Hist. du Cons. et de l'Empire*, liv. xvii. ; Las Cases, *Mémoires de Napoléon*, vol. vii. pp. 32, 33 ; *U. S. Statutes at Large*, vol. i. p. 577 ; Bello, *Derecho Internacional*, pt. ii. cap. ii. § 2 ; Heffter, *Droit International*, § 126.

At the commencement of the Franco-Prussian war of 1870, subjects of Prussia who were actually in France were permitted to continue to reside there, so long as their conduct furnished no motive for complaint. The admission of Prussians into France was limited to special cases, and for exceptional reasons. Merchant vessels belonging to the enemy which were actually in the French ports, or which entered the ports in ignorance of the war, were allowed a delay of thirty days for leaving, and safe-conducts were given them to return to their port of despatch or of destination. Vessels which took in cargoes for France, or on French account, in enemies' or neutral ports before the declaration of war, were not subject to capture, but were allowed to disembark their freights in the French ports, and afterwards received safe-conducts to return to their ports of despatch (*Journal Officiel*, July 21, 1870). This permission was afterwards, in part, rescinded ; Prussians being expelled from the department of the Seine, and obliged either to retire to the south of the Loire or to leave France altogether.

In 1854, at the commencement of the Crimean war, Lord Clarendon, in answer to a deputation of Russian merchants, declared that the Government was disposed to respect the persons and property of all Russian subjects residing as merchants in this country, to the full extent promised by the Emperor of Russia towards British subjects, and that all necessary measures would be adopted to enable them to remain unmolested in the quiet prosecution of their business.

² On the declaration of a war between the Ottoman Porte and Russia,

former times, this right was exercised with great rigour, but it has now become an established, though not inflexible, rule of international law, that such property is not liable to confiscation as a prize of war. This rule, says Chief Justice Marshall, 'like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign—it is a guide which he follows or abandons at his will ; and, although it cannot be disregarded by him without obloquy, yet it may be disregarded. It is not an immutable rule of law, but depends on political considerations, which may continually vary.' Wheaton says that in the recent maritime wars commenced in Great Britain it has been the constant usage to seize and condemn, as droits of admiralty, the property of the enemy found in its ports at the breaking out of hostilities, and that this practice does not appear to have been influenced by the corresponding conduct of the enemy in that respect. The English text-writers, down to the beginning of the war of 1854 with Russia, continued to maintain the existence of the right to seize and condemn, not only as a general right of war, but as one which could be exercised by the crown, without any express act of parliament to sanction it.¹

§ 16. Debts contracted before the declaration of war, and in October 1853, a notice was issued by the latter government to the effect that, as the Porte had not imposed an embargo on Russian vessels in its ports, &c., the Russian government, on its part, granted liberty to Turkish vessels in its ports to return to their destination, till the 10th (22nd) of November. After the declaration of hostilities by France and England against Russia, similar declarations were made by these powers. That of France, dated March 27, 1854, declares : 'Art. 1. Six weeks from the present date are granted to Russian ships of commerce to quit the ports of France. Those Russian ships which are not actually in our ports, or which may have left the ports of Russia previously to the declaration of war, may enter into French ports, and remain there for the completion of their cargoes, until the 9th of May, inclusive.' The declaration of England, to the same effect, was dated March 29, 1854. Still further indulgences were afterward declared to Russian vessels, which had sailed prior to May 15, 1854, for English and French ports. Russia allowed English and French vessels six weeks from April 25, 1854, to take on board their cargoes and sail from Russian ports in the Black Sea, the Sea of Azoff, and the Baltic, and six weeks from the opening of navigation to leave the ports of the White Sea. See also the *Paris Moniteur*, March 28, 1854 ; *London Gazette*, April 18, 1854 ; *Cong. Doc.*, 33 *Cong.*, *H. R.* No. 103, p. 5 ; *Circulaire du Ministre de la Marine, Annuaire*, &c., 1853-4, app. v. pp. 913, 926, 928.

¹ Wheaton, *Elem. Int. Law*, p. iv. ch. i. § 11 ; Brown v. The United States, 8 *Cranch. R.*, 123 ; Kluber, *Droit des Gens*, §§ 250-252 ; Moser, *Versuch*, &c., b. ix. §§ 49-60 ; Vattel, *Droit des Gens*, liv. iii. ch. iv. § 63 ;

Debts due
to an
enemy

owing by one belligerent, or its allies, to the enemy, are necessarily merged in the war, and must abide the issue of the contest, or rather the stipulations of the treaty of peace by which it is terminated. Formerly debts contracted in time of peace, and owing by the belligerent State, or its subjects, to the subjects of the enemy, were also regarded as annulled or confiscated by the declaration of war. This doctrine is fully recognised in the writings of Cicero, Grotius, Puffendorf, Bynkershoek, and others. But, according to Vattel, the rigour of this rule was afterwards relaxed, and the opposite custom grew up in its place, which has now become so general throughout Europe, that the sovereign who should enforce the former rule, would be regarded as violating good faith; for strangers trusted his government or subjects only from the firm persuasion that the modern custom would be observed. Emerigon and Martens advocate the same doctrine. The question is also most ably discussed by Hamilton in the numbers of *Camillus*, published in 1795.

The Supreme Court of the United States has decided that the right, *stricti jure*, still exists as a settled and undoubted right of war recognised by the law of nations, although it was, at the same time, admitted to be the universal practice at present to forbear to seize and confiscate debts and credits, as also to seize and confiscate enemy's tangible property found in the country at the opening of the war.¹ The court would not confiscate without an act of the legislative power declaring its will that such property should be condemned. Mr. Justice Story dissented in a most able and learned opinion. Phillimore makes a distinction between debts due from the State, in its corporate capacity, to individuals—money invested in the public funds and the like—and private debts

ch. v. §§ 76, 77; De Cussy, *Droit Maritime*, liv. i. tit. iii. § 6. See also vol. ii. ch. xxii.

In a civil war, captures of the property of those in rebellion against the established Government, whether made on land or sea, are not prize of war; such can only be condemned by virtue of municipal law—*United States v. 269½ Bales of Cotton*, *Rev. Cas.*, 2; the 'Mary McRae,' *Blatchf. Pr. Cas.* 91. The Confiscation Act of the United States, passed in 1861, did not embrace *choses in action*, such as State bonds. (*United States v. Virginia Bonds*, 9 *Pittsb. Leg. J.*, 377.) Moneys voluntarily contributed to a rebellion cannot be recovered as moneys received for the use of the lawful Government. (*United States v. McRae*, *L.R.*, 8 *Eq.*, 69.)

¹ *Brown v. The United States*, 8 *Cranch R.*, 123, and see the 'Emulous,' 1 *Gall.*, 563.

of individuals of the one State to individuals of the other. While admitting that private debts may be confiscated, *stricti jure*, although modern custom is opposed to the exercise of that right, he says that the opinion of Vattel, Emerigon and Martens, against the lawfulness of confiscating those due from the *State* to enemy's subjects, 'now may happily be said to have no gainsayers.' Wildman says: 'It will not be easy to find an instance where a prince has thought fit to make reprisals upon a debt due from himself to private men; there is a confidence that this will not be done. A private man lends money to a prince upon the faith of an engagement of honour, because he cannot be compelled, like other men, in an adverse way in a court of justice. So scrupulously did England, France, and Spain adhere to this public faith, that during war they suffered no inquiry to be made whether any part of the public debts was due to subjects of the enemy, though it is certain many English had money in the French funds, and many French had money in ours.' With respect to the confiscation of private debts, the same author considers that the rigid rule of Grotius and Bynkershoek has been more or less mitigated by the wise and humane practice of modern times. 'By the (repealed) 34 *Geo.* 3, c. 79,' he says, 'the transmission of money due to the enemy was prevented; the money itself was called in, secured, and kept for those to whom it was due, until the return of peace should enable them to receive it.'¹

¹ Wildman, *Int. Law*, vol. ii. pp. 10, 11; Cicero, *De Off.*, lib. iii. cap. xxvi.; Grotius, *De Jure Bell. ac Pac.*, lib. i. cap. i. § 6; lib. iii. cap. vii. §§ 3, 4; Puffendorf, *De Jur. Nat. et Gent.* lib. viii. caps. vi. xix. xx. xxiii.; Bynkershoek, *Quæst. Jur. Pub.*, lib. i. cap. vii.; Vattel, *Droit des Gens*, liv. iii. ch. v. § 77; Hamilton, *The Federalist*, *Camillus*, Nos. 18-23; *Brown v. The United States*, 8 *Cranch. R.*, 110; Phillimore, *On Int. Law*, vol. iii. §§ 87-89, and see vol. ii. ch. xxiv.

The Congress of the Confederate States enacted, in August 1861, that property of whatever nature, except public stocks and securities, held by an alien enemy since May 21 of that year, should be sequestered and appropriated as directed by the Act. Further, the Attorney-General of the Confederate States declared that all persons who had a domicil within the States, with which the Confederate Government was at war, were subject to the provisions of the Act. Lord John Russell instructed the British Consul to remonstrate strongly with the Secretary of State of the so-called Confederate States, on the hardship and injustice of the Act as regarded neutrals, insisting that the modern rule of international usage that the property and debts of an enemy, at the beginning of hostilities, were not liable to be confiscated as prize of war, applied with still more force in a civil war between different parts of a confederation, during whose union the subjects of foreign States were invited to settle indis-

Distinc-
tion
between
public and
private
debts

§ 17. After a full examination of the authorities and decisions on this question, Chancellor Kent says: 'We may, criminally, without any ground for contemplating a disruption. No notice, or time, had allowed them to separate their affairs from either belligerent, and though technically liable to be considered enemies, it was impossible to treat them as such, without gross injustice and a breach of faith. (*Parl. Papers*, 1862, *N. Amer.*, 108.)

The payment of a moiety of the Russian-Dutch loan, is an instance of an obligation undertaken, by Great Britain, for a permanent equivalent, in consideration of Holland agreeing that Great Britain should retain certain Dutch colonies and dependencies, of which Great Britain was in possession at the conclusion of the war, in 1814. Great Britain took upon herself the obligation of a moiety of a certain loan, made by Holland to Russia, during the war. It was recited in the fifth article of the Convention of London (May 19, 1815), that it was understood and agreed between the high contracting parties (Great Britain, the Netherlands, and Russia), that the payment on the part of the King of the Netherlands and the King of Great Britain should cease and determine (such payments being payments of an annual interest, of five per cent., together with a sinking fund, of one per cent.), if the possession and sovereignty of the Belgic Provinces should at any time pass, or be severed, from the dominions of the King of the Netherlands, at any time before the complete liquidation of the same; and that it was also understood and agreed, between the high contracting parties, that the payments on the part of their Majesties the King of the Netherlands and the King of Great Britain, as aforesaid, should not be interrupted in the event of a war breaking out between any of the three high contracting parties, the Government of his Majesty, the Emperor of all the Russias, being actually bound to his creditors by a similar agreement.

Upon the separation of the Belgic Provinces from the kingdom of Holland, in 1831, Great Britain entered into a new convention with Russia, conceiving that, though the event had happened, which, according to the letter of the convention of 1815, released Great Britain as well as Holland from the obligation of continuing to pay off her portion of the loan, Great Britain was still bound, according to the *spirit* of the convention, which was made on her part, in consideration of the general arrangements of the Congress at Vienna, to adhere to her engagements. A new convention between Russia and Great Britain was accordingly executed (London, November 10, 1831), whereby the King of Great Britain undertook to recommend to the British Parliament, to enable him to continue the payments stipulated in the convention of May 19, 1815, conformably to the manner, and until the liquidation of the sum therein specified. Notwithstanding that open war arose between Great Britain and Russia in 1854, Great Britain never faltered in her good faith in the matter of the understanding between herself and the other two Powers, as set out in the fifth article of the convention; and the interest and instalments of the loan have been regularly voted, without the slightest interruption, by the British Parliament, and paid by the British Government to the agents of the Russian Government. Further, when a motion was made by Lord Dudley Stuart in the House of Commons, in the month of August, 1854, during the war with Russia, that Great Britain should renounce her obligation to make any further payments of the loan, upon the ground that Russia had violated the general arrangements of the Congress of Vienna, the motion was rejected on this, amongst other grounds, that Great Britain, being at war with Russia, was bound, by a regard to national honour, to be more than ever jealous of affording the slightest grounds for the accusation that she wished to repudiate debts

therefore, lay it down as a principle of public law, so far as the same is understood and declared by the highest judicial authorities in this country, that it rests in the discretion of the legislature of the union, by a special law for that purpose, to confiscate debts contracted by our citizens, and due to the enemy ; but, as it is asserted by the same authority, this right is contrary to universal practice, and it may, therefore, well be considered as a naked and impolitic right, condemned by the enlightened conscience of modern times.' On this question, Wheaton remarks : ' In respect to debts due to an enemy, previously to the commencement of hostilities, the law of Great Britain pursues a policy of a more liberal, or at least, of a wiser character, than in respect to droits of admiralty. A maritime power, which has an overwhelming superiority, may have an interest, or may suppose it has an interest, in asserting the right of confiscating enemy's property, seized before an actual declaration of war ; but a nation which, by the extent of its capital, must generally be the creditor of every other commercial country, can certainly have no interest in confiscating debts due to an enemy, since that enemy might, in almost every instance, retaliate with much more injurious effect. Hence, though the prerogative of confiscating such debts, and compelling their payment to the crown, still theoretically exists, it is seldom or ever practically exerted. The right of the original creditor to sue for the recovery of the debt is not extinguished ; it is only suspended during the war, and revives in full force on the restoration of peace. Such, too, is the law and practice in the United States. The debts due by American citizens to British subjects before the War of the Revolution, and not actually confiscated, were judicially considered as revived, together with the right to sue for their recovery on the restoration of peace between the two countries.' In the United States, time does not run against a creditor during the war ; but it is otherwise in England.¹ By the treaty of 1794, between the United States and Great Britain, it was stipulated that debts due from individuals of the one nation to individuals of the other,

justly contracted, with the Power which was for the time her enemy. (Sir Travers Twiss, *Law of Nations*, vol. ii., 112.)

¹ *Hanger v. Abbott*, 6 *Wall.*, 532 ; *De Wahl v. Braune*, 25 *L. J. Ex.*, 343.

should never, in any event of war or national differences, be sequestered or confiscated.¹

Distinction made by English text-writers

§ 18. While the English text-writers and jurists have contended for the right to seize and sequester the property of an alien enemy found in British territory, at the declaration of a war, as a right conceded by the law of nations, they have almost uniformly denied the right to confiscate debts due to such enemy, on the ground that usage and custom have annulled that right. Wheaton gives several examples of the application of this doctrine. 'On the commencement,' he says, 'of hostilities between France and Great Britain, in 1793, the former power sequestered the debts and other property belonging to the subjects of her enemy, which decree was retaliated by a countervailing measure on the part of the British government. By the additional Articles to the treaty of peace between the two powers, concluded at Paris in April, 1814, the sequestrations were removed on both sides, and commissaries were appointed to liquidate the claims of British subjects for the value of their property unduly confiscated by the French authorities, and also for the total or partial loss of the debts due to them, or other property unduly retained under sequestration subsequent to 1792. But it does not appear that French property, seized in the ports of Great Britain and at sea, in anticipation of hostilities, and subsequently condemned as droits of admiralty, were restored to the original owners under this treaty, on the return of peace between the two countries.'²

Examples of its enforcement

§ 19. The same author says: 'On the rupture between Great Britain and Denmark in 1807, the Danish ships, and other property, which had been seized in the British ports, and on the high seas, before the actual declaration of hostilities, were condemned as droits of admiralty by the retrospective operation of the declaration. The Danish government issued an Ordinance retaliating this seizure, by sequestering all debts due from Danish to British subjects, and causing them to be paid into the Danish royal treasury. The English

¹ Kent, *Com. on Am. Law*, vol. i. p. 65; Wheaton, *Elem. Int. Law*, pt. iv. ch. i. § 12; *The State of Georgia v. Brailsford et al.*, 3 *Dall. R.*, 4; ex parte Boussmaker, 13 *Vesey Jun. R.*, 71; the 'Nuestra Señora de las Dolores,' *Edw. R.*, 60; *Furtade v. Rodgers*, 3 *Bos. and Pull. R.*, 191; *Ware v. Hilton et al.*, 3 *Dall. R.*, 199.

² Wheaton, *Elem. Int. Law*, pt. iv. ch. i. § 12.

Court of King's Bench determined that this Ordinance was not a legal defence to a suit in England for such a debt, not being conformable to the usage of nations ; the text-writers having condemned the practice, and no instance having occurred of the exercise of the right, except the Ordinance in question, for upwards of a century. It has been justly observed that between debts contracted under the faith of laws, and property acquired on the faith of the same laws, reason draws no distinction ; and the right of the sovereign to confiscate debts is precisely the same with the right to confiscate other property found within the country on the breaking out of the war. Both require some special act expressing the sovereign will, and both depend, not on any inflexible rule of international law, but on political considerations, by which the judgment of the sovereign may be guided.' In another place, Wheaton said, in reference to this transaction, 'It is difficult to show a reasonable distinction between debts contracted under the public faith in time of peace, and property found in the enemy's territory on the breaking out of the war, or taken at sea before the declaration of hostilities.' The amount of Danish property condemned by the British government in 1807, as droits of admiralty, was computed at one million two hundred and sixty-five thousand pounds, while the debts due to British subjects, sequestrated by Denmark, amounted to only from two hundred thousand pounds to three hundred thousand pounds.¹

§ 20. In the case of the 'Silesian Loan,' a controversy arose between Great Britain and Prussia, in 1753, because the King of Prussia had, by way of reprisals for the capture by Great Britain of certain Prussian vessels, engaged in prohibited commerce, confiscated certain funds which had been lent to him by English subjects on the security of the revenues of Silesia, and which he had, under the treaties of Breslau, Berlin, and Dresden, 1742, personally bound himself to repay. Prussia was, at the time of the capture of the ships, at peace with Great Britain. The principles laid down by Great Britain in the above controversy, with respect to reprisals, and to the injustice of confiscating private debts to meet public claims, met with universal approval.²

¹ Wheaton, *supra*.

² The history of the loan is as follows :—A loan of 80,000*l.* had been advanced by subjects of Great Britain to the Emperor Charles VI. on

The
Silesian
loan

Com-
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§ 21. As remarked in a preceding paragraph, it is not, in all cases, easy to determine from what circumstances, and at

the security of the Duchies of Silesia. This territory was, in course of time, transferred to Prussia by virtue of the treaties of Breslau and of Dresden, in consideration of which cession Prussia was to discharge the debt. The King of Prussia, however, attached the debt by way of re-tortion, which, by the terms of the treaty, he had no power to do. The Duke of Newcastle, the minister of the day, took the opinion of the law officers of the Crown, who reported that the King of Prussia had pledged his royal word to pay the Silesian debt, and ought to be compelled to make good his engagement. The Duke of Newcastle thereupon enforced the obligation to pay the debt in the following letter :—

‘The Duke of Newcastle to Mr. Mitchell, the King of Prussia’s Secretary of Embassy.

‘Whitehall, February 8, 1753.

‘SIR,—I lost no time in laying before the King the memorial which you delivered to me on November 23 last, with the papers that accompanied it. His Majesty found the contents of it so extraordinary, that he would not return an answer to it, or take any resolution upon it, till he had caused both the memorial and the *Exposition des Motifs*, &c., which you put into my hands soon after, by way of justification of what had passed at Berlin, to be maturely considered, and till his Majesty should thereby be enabled to set the proceedings of the Court of Admiralty here in their true light, to the end that his Prussian Majesty and the whole world might be rightly informed of the regularity of their conduct ; in which they appear to have followed the only method which has ever been practised by nations, where disputes of this nature could happen, and strictly to have conformed themselves to the law of nations, universally allowed to be the rule in such cases, when there is nothing stipulated to the contrary, by particular treaties, between the parties concerned.

‘This examination, and the full knowledge of the facts resulting from it, will show so clearly the irregularity of the proceedings of those persons, to whom this affair was referred at Berlin, that it is not doubted, from his Prussian Majesty’s justice and discernment, but that he will be convinced thereof, and will revoke the detention of the sums assigned upon Silesia, the payment of which his Prussian Majesty engaged to the Empress Queen to take upon himself, and of which the reimbursement was an express article in the treaty, by which the cession of that Duchy was made. I, therefore, have the King’s orders to send you the Report made to his Majesty, upon the papers above mentioned, by Sir George Lee, Judge of the Prerogative Court ; Dr. Paul, his Majesty’s Advocate-General in the Courts of Civil Law ; Sir Dudley Rider and Mr. Murray, his Majesty’s Attorney and Solicitor General. This report is founded upon the principles of the laws of nations, received and acknowledged by authorities of the greatest weight in all countries ; so that his Majesty does not doubt but that it will have the effect desired

‘Sixthly—That even though reprisals might be justified by the known and general rules of the law of nations, it appears from the Report, and indeed from considerations which must occur to everybody, that sums due to the King’s subjects by the Empress Queen, and assigned by her upon Silesia, of which sums his Prussian Majesty took upon himself the payment, both by the Treaty of Breslau and that of Dresden, in consideration of the cession of that country, and which, by virtue of that very cession, ought to have been fully and absolutely discharged in the year 1745, that is to say, one year before any of the facts complained of did happen, could not, either in justice or reason, or according to what

what period, war shall be said to have commenced, so as to fix the character of a public enemy on the State with which it is waged. Where a public declaration or manifesto precedes hostilities, the war exists from the time it is declared. But such a precedent declaration is not, as has already been stated, necessary to legalise hostilities ; and, by modern usage, it is sometimes dispensed with, and the war commenced without any public notice of warning. Not only reprisals, but

is the constant practice between all the most respectable Powers, be seized or stopped by way of reprisals.

‘ It is material to observe upon this subject, that this debt on Silesia was contracted by the late Emperor Charles VI., who engaged not only to fulfil the conditions expressed in the contract, but even to give the creditors such further security as they might afterwards reasonably ask. This condition has been very ill performed by a transfer of the debt, which has put it in the power of a third person to seize and confiscate it. You will not be surprised, Sir, that in an affair that has so greatly alarmed the whole nation, who are entitled to that protection that his Majesty cannot dispense with himself from granting, the King has taken time to have things examined to the bottom, and that his Majesty finds himself obliged by the facts to adhere to the justice and legality of what has been done in his courts, and not to admit the irregular proceedings which have been carried on elsewhere. The King is fully persuaded that what has passed at Berlin, has been occasioned solely by the ill-grounded information which his Prussian Majesty has received of these affairs, and does not at all doubt but that when his Prussian Majesty shall see them in their true light, his natural disposition to justice and equity will induce him immediately to rectify the steps which have been occasioned by those informations, and to complete the payment of the debt charged on the Duchy of Silesia, according to his engagement for that purpose.

‘ I am, &c., &c.,

‘ Holles Newcastle.’

The following is an extract from the seventh proposition of the above-mentioned report :—‘ The King of Prussia has engaged his royal word to pay the Silesia debt to private men. It is negotiable, and many parts have been assigned to the subjects of other Powers. It will not be easy to find an instance where a prince has thought fit to make reprisals upon a debt due from himself to private men. There is a confidence that this will not be done. A private man lends money to a prince upon the faith of an engagement of honour, because a prince cannot be compelled, like other men, in an adverse way by a court of justice. So scrupulously did England, France, and Spain adhere to this public faith, that even during the war they suffered no inquiry to be made, whether any part of the public debts was due to subjects of the enemy, though it is certain many English had money in the French funds, and many French had money in ours. This loan to the late Emperor of Germany, Charles VI., in January 1734–5, was not a State transaction, but a mere private contract with the lenders who advanced their money upon the Emperor’s obliging himself, his heirs, and posterity, to repay the principal with interest, at the rate, in the manner, and at the times in the contract mentioned, without any delay, demur, deduction, or abatement whatsoever.’

The matter was finally settled in 1756, Prussia agreeing to pay the loan, and Great Britain discharging certain claims of Prussia. (*The Silesian Loan*, De Martens, *Causes Célèbres*, vol. ii. p. 97.)

acts of more positive aggression, under the sanction and authority of the government, sometimes precede the declaration of war, and are covered by its retroactive effect. Again, in other cases, no declaration or manifesto is ever issued, or, if issued at all, it merely recognises the war, as that between the United States and Mexico, to be an existing fact. Where the government itself has fixed no positive time for the commencement of hostilities, either past or future, and where its intentions are at all doubtful, the conduct of individuals is entitled to a lenient and favourable construction. A court will not, in such cases, condemn property as involved in trade with the enemy, unless fully satisfied, not only that hostilities existed, but that the fact was so public and notorious that the knowledge of its existence was justly to be imputed to the parties by whom the acts of supposed illegality were committed or authorised. It would be plainly unjust to confiscate property, or annul contracts, where reasonable doubts exist, either as to the intentions of the government or the knowledge of the parties.

In regard
to neutrals

§ 22. The same leniency is certainly due to neutrals in such cases. Where there has been no official declaration of war, and no notification by manifesto of its actual existence, the conduct of neutrals is entitled to the most favourable construction, and neutral property cannot be condemned, for violation of neutral duty, without proof that the war *de facto* was so public and notorious that the neutral could not have been in ignorance of its existence. But where such knowledge is actually brought home to him, it seems to us to place him in the same position, with respect to the character of his acts, as if an official declaration or manifesto had been issued. Hautefeuille, however, thinks the declaration or manifesto absolutely essential to bind neutrals. Even in the case of defensive war, supposed by Vattel, where the party attacked is required to repel hostilities, belligerent rights accrue as against the enemy only, but not with respect to neutrals. So far as they are concerned, such hostilities are to be regarded precisely as if they did not exist. But this view is not supported either by reason or usage.¹

§ 23. A declaration of war does not *ipso facto* extinguish

¹ Hautefeuille, *Des Nations Neutres*, tit. iii. ch. i. ; Vattel, *Droit des Gens*, liv. iii. ch. iv. § 51.

treaties between the belligerent States. Treaties of friendship and alliance are necessarily annulled by a war between the contracting parties, except such stipulations as are made expressly with a view to a rupture, such as limitations of the general rights of war, &c. So of treaties of commerce and navigation; they are generally either suspended or entirely extinguished by a war between the parties to such treaties. All stipulations, with respect to the conduct of the war, or with respect to the effect of hostilities upon the rights and property of the citizens and subjects of the parties, are not impaired by supervening hostilities, this being the very contingency intended to be provided for, but continue in full force until mutually agreed to be rescinded. There are many stipulations of treaties, which, although perpetual in their character, are suspended by a declaration of war, and can only be carried into effect on the return of peace. This subject has been already noticed in chapter viii.

Effects of
declara-
tion of
war on
treaties

§ 24. We have mostly confined our remarks to the effects of a declaration of war upon belligerent States and their subjects in their international relations. Its effects upon the relations of the citizens of a belligerent State with their own government belong to constitutional or municipal law, rather than to general public law; any place, port, town, fortress, or section of country occupied by the enemy, is, for most purposes, regarded in law as *hostile territory*, so long as such occupation is continued. If the place so occupied were previously neutral, or a part of our own territory, it is no longer regarded as such, for it would be absurd to suppose that persons who are hostile themselves, or who are under a hostile authority, are to exercise the same civil rights as neutrals or citizens in time of peace. The relations of the government to a place or territory so occupied or situated, are of a military character, and consequently are not regulated by the civil laws, which are made for the condition of peace. This change of relation, or rule of government, does not result from anything in the particular constitution or laws, but from the *fact* of the existence of war and the hostile occupation of the place. The same rule applies to a place, or district of country, which is invaded or besieged by an enemy; the *fact* of the invasion or beleaguerment is, in itself, a substitution of military for civil authority; the absence of peace

On local
civil laws

suspends the law of peace, and the presence of war substitutes military rule.

Difference
between
military
and
martial
law

§ 25. It is necessary to distinguish between Military and Martial law ; for the two are very different. In Great Britain the former has only to do with the land forces mentioned in section 2 of the Mutiny Act—now the Army Act 1881—and in the Articles of War. In the United States the ‘ Rules and Articles of War ’ constitute the Military law. This law exists equally in peace, and in war, and is as fixed and definite in its provisions as the Admiralty, Ecclesiastical, or any other branch of law, and is equally with them a part of the general law of the land. But Martial law originates either in the prerogative of the Crown, as in Great Britain, or from the exigency of the occasion, as in other States ; it is one of the rights of sovereignty, and is as essential to the existence of a State as is the right to declare or carry on war. It is a power inherent in every government, and must be regarded and recognised by all other governments. It is one of the incidents of war, invasion, or rebellion ; and arises when there is no time for the slow and cumbrous proceedings of the Civil law. Like the power to take human life in battle, it results directly and immediately from the fact, that war, in name or in substance, exists.¹

Declara-
tion of
martial
law

§ 26. What is called a declaration of Martial law, is the mere announcement of a fact ; it does not and cannot create that fact. The exigencies which, in any particular place, justify the taking of human life without the interposition of the civil tribunals, and without the authority of the Civil law, may justify the suspension of the power of such tribunals and the substitution of Martial law. The law of war, or at least many of its rules, are merely the results of a paramount necessity. On this point we quote the language of Attorney-

¹ The following opinion refers to the use of the military in time of peace, and when martial law is *not* proclaimed. It was given by the Attorney-General for England in 1801. The case is as follows :—

‘ It frequently happens upon the breaking out of riots or other disturbances, at a distance from the abode of any magistrate, that the officers commanding troops have expressed doubts how far, and under what circumstances, they would be justified in proceeding to suppress such riots and disturbances without the directions of a magistrate or such other peace officers as are specified in the Riot Act. Your opinion is requested whether, in case of any sudden riot or disturbance, a constable or other peace officer, being under the degree of those described in the Riot Act, can call upon the military to suppress such riot

General Cushing: 'There may undoubtedly be, and have been, emergencies of necessity, capable of themselves to produce, and therefore to justify, such suspension of all law, and involving, for the time, the omnipotence of military power. But such a necessity is not of the range of mere legal questions. When Martial law is proclaimed, under circumstances of assumed necessity, the proclamation must be regarded as the statement of an existing fact, rather than the legal creation of that fact. In a beleaguered city, for instance, the state of siege lawfully exists, because the city is beleaguered, and the proclamation of Martial law, in such case, is but notice and authentication of a fact—that civil authority has been suspended, of itself, by the force of circumstances, and that, by the same force of circumstances, the military has

or disturbance ; and how far, in the absence of any constable, or other peace officer at all, the military would be justified in proceeding to suppress any riot which might break out.'

Opinion :—'I understand the disturbances here meant be such as amount to the legal description of riots. The word "disturbance" has no legal and appropriate meaning, beyond a mere breach of the peace, which is not, however, the sense in which the word is used in this case, the case plainly importing a breach of the peace by an assembled multitude.

'In case of such sudden riot and disturbance, as above supposed, any of his Majesty's subjects, without the presence of a peace officer of any description, may arm themselves, and, of course, may use ordinary means of force to suppress such riot and disturbance. This was laid down in my Lord Chief Justice Popham's Reports, 121, and Keeling, 76, as having been resolved by all the judges in the 39th of Queen Elizabeth to be good law, and has certainly been recognised in Hawkins and other writers on the Crown Law, and by various judges at different periods since.

'And what his Majesty's subjects may do they also ought to do for the suppression of public tumult, when an exigency may require that such means be resorted to. Whatever any other class of his Majesty's subjects may allowably do in this particular the military may unquestionably do also. By the common law every description of peace officer may, and ought, to do not only all that in him lies towards the suppression of riots, but may, and ought to, command all other persons to assist therein. However, it is by all means advisable to procure a justice of the peace to attend, and for the military to act under his immediate orders, when such attendance and the sanction of such orders can be obtained, as it not only prevents any disposition to unnecessary violence on the part of those who act in repelling the tumult, but it induces also, from the known authority of such magistrates, a more ready submission on the part of the rioters to the measures used for that purpose ; but still, in cases of great and sudden emergency, the military, as well as all other individuals, may act without their presence, or without the presence of any other peace officer whatsoever.

(Signed 'Edward Law.

'Lincoln's Inn : April 1, 1801.'

had devolved upon it, without having authoritatively assumed, the supreme control of affairs in the care of the public safety and conservation. Such, it would seem, is the true explanation of the proclamation of Martial law at New Orleans by General Jackson.' The declaration, or exercise of martial law in a foreign country, by the commander of an invading, occupying, or conquering army, is an element of the *jus belli*.¹

Court of
the Con-
stable and
Marshal

§ 27. Martial law, in England, was exercised by the ancient Court of the Constable and Marshal, which in time of war followed in the wake of the army and punished all offences in a summary manner—that is, not according to the Common Law of the realm, but according to the Civil (or rather Continental) law. The Constable and Marshal had, by virtue of their commission, 'plenam potestatem et auctoritatem ad cognoscendum et procedendum in omnibus et singulis causis et negotiis de et super crimine læsæ majestatis, seu ipsius occasione, cæterisque causis quibuscunque . . . summarie et de plano, sine strepitu et figura judicii solâ facti veritate inspectâ.' Commanders-in-chief have exercised similar powers, by virtue of commissions from the Crown; the rules of the Constable and Marshal's Court are to be found in 'The Black Book of the Admiralty,' vol. i. p. 282. It is evident that the summary procedure of the Marshal's Court, in the exercise of Martial law, cannot be made use of in time of peace when the King's courts are open. The judgment against Edmund, Earl of Kent, condemned to death, by court martial, in the fifteenth year of Edward II., was reversed in Parliament because the Earl had been taken in time of peace, 'when the Chancery and other courts, holding pleas of the Lord King, were open, in which law might be administered to anyone, as it was accustomed to be; nor was the Lord King ever, during that time, mounted on horse, with banners unfurled (i.e. going to war).' Martial law has been recognised by many Acts of Parliament, among others by 39 Geo. III. c. 11 (Ir. Act), 43 Geo. III. c. 117, and 3 Will. IV. c. 4. Lord Hale says: 'In matters Civil, for which there is no remedy by the Common laws, the military jurisdiction continues as well after the war as during the time of it; for *that part* of the jurisdiction of the Constable and Marshal stands still, notwithstanding the

¹ Cushing, *Opinions of U. S. Attorneys-General*, vol. iii. pp. 365 et seq.; O'Brien, *American Military Law*, p. 28.

war determines, as concerning right of prisoners and booty, military contracts, ensigns, &c.'¹ A number of instances are cited, where the court took cognisance of cases of goods taken beyond the seas, of prisoners, of hostages, ransom, &c., and where, during the minority of the Constable of England, his authority to try such cases was delegated to others by special commission. Henry VIII. abolished the office of Constable. The statute of Richard II. enacts, 'To the Constable it pertaineth, to have cognisance of contracts touching deeds of arms and of war out of the realm, and also of things that touch war within the realm, which cannot be determined nor discussed by the Common law, with other usages and customs to the same matters pertaining.' It will be noticed that the word 'Marshal' is not employed in the above sentence, although the statute clearly refers to the 'court of the Constable and Marshal.' Those two persons presided over it as judges. The Earl-Marshal frequently held the court alone²

¹ There is a direct instance of the exercise of this jurisdiction in a manuscript treatise of Lord Hale, in Lincoln's Inn Library, headed, 'Upon certain petitions of late exhibited in the Court of Chivalry there have been raised divers questions of law.'

² Thomas, Duke of Norfolk, as marshal, held a court for the trial of the Lincolnshire rebels in 1535, being twenty years after the extinction of the constablenesship. Nor was the jurisdiction of that court in the least contested. (Gilbert, *Hist. of Reform*, i. lib. iii.) In 1622, in consequence of the jurisdiction of the earl marshal being questioned by two defendants (Brook and Treswell), the Lords of the Council were required by James I. to investigate and determine the issue. All parties were commanded to be present. Their lordships determined that the authority of the earl marshal severally, as well as jointly with a high constable, was fully set forth, and that the authorities were so very good that it was plain the earl marshal was a judge, and had power of judicature in the vacancy of a constable, as well as with the constable, and that there had been as much said to prove the authority of that court as could be said for any court in Westminster Hall. On this report the King issued his commission on the 1st of August following, and declared that 'the constable and marshal were joint judges together, and several in the vacancy of either,' and commanded the earl marshal from henceforth to proceed 'in all causes whatsoever whereof the court of constable and marshal ought properly to take cognisance, as judicially and definitively as any constable or marshal of this realm, either jointly or severally, hitherto has done.' This court followed the rules of Civil Law, but 'the Course and Custom of Chivalry and Arms' governed all cases for which that law was found wanting. In 1702, the laughable decision in *Chambers v. Jennings* (7 *Mod. Rep.*, 125), that this court, not being a court of record, could neither fine nor imprison, inflicted an irreparable injury on its authority. Nevertheless this court (although slumbering) may still exist. The statute defining its jurisdiction is unrepealed. The marshal was judge of all army causes; but if the suit could not be decided according to the principles of Civil law it was left to a personal combat, which

after the constableness had become extinct. The last case tried before it was that of Sir Henry Blunt in 1737.¹

Martial
law on the
Continent

§ 28. The laws of different countries, with respect to the application and exercise of Martial law, are very different. In the jurisprudence of France, for example: 1st. *The state of peace*, where all persons are governed by the civil or military authority, according to the class to which they belong, and the law applicable to the particular case; 2nd. *The state of war*, where the law and authority governing depend upon the particular condition of the place and circumstances of the case, the civil authority sometimes acting in concert with, and sometimes in subordination to, the military; and 3rd. *The state of siege*, where the civil law is suspended for the time being, or, at least, is made subordinate to the military, and the place is put under *martial law*, or under the authority of the military power. This may result from the presence of a foreign enemy, or by reason of a domestic insurrection, and the rule applies to a district of country as well as to a fortress or city. A similar system is adopted in Spain, and in most of the countries of continental Europe. 'The state of siege of the continental jurists,' says Cushing, 'is the proclamation of Martial law of England and the United States; only we are without law on the subject, while in other countries it is regulated by known limitations.' The English Common Law authorities, and commentators, generally confound *martial* with *military* law, and consequently throw very little light upon the subject considered as a domestic fact, and, in parliamentary debates, it has usually been discussed as a *fact* rather than as forming any part of their system of jurisprudence. Nevertheless, there are numerous instances in which Martial law has been declared and enforced in time of rebellion or insurrection, not only in India and British colonial possessions, but also in England and Ireland. No Act of was attended with a vast variety of ceremonies. The arrangement of this, even to the minutest trifle, fell within the marshal's province. To this day he, or his deputy, regulates all points of precedence according to the archives kept in the Herald's Office, which is entirely under his jurisdiction. He directs all solemn processions, coronations, proclamations, general mournings, &c. In those reigns where proclamations had the force of law he possessed a censorial power in all cases of usurping false names, designations, armorial bearings, and the like. The badge of the earl marshal is a gold baton tipped with ebony. The Duke of Norfolk is the hereditary earl marshal.

¹ Hale, *De Prærogativa*, cap. xi. § 3; Sir H. Blunt's case, 1 *Atk.*, 296.

parliament is required to precede such declaration, although it is usually followed by an Act of indemnity, when the disturbances which called it forth are at an end, in order to give constitutional existence to the *fact* of Martial law.¹

§ 29. Martial law is not mentioned by name in the constitution or statutes of the United States, nor is there much light thrown upon the subject by the constitutions and laws of the several States of the Union, or the decisions of its courts. It is true that the Constitution recognises the *fact* that there may be cases of rebellion and invasion, but it has made no general provision for the supposable or necessary incidents to such a condition of affairs. The only clause having direct relevancy to this subject is the declaration that 'the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it.' Now, the suspension of the writ of *habeas corpus* is not in itself a declaration of Martial law ; it is simply an incident, although a very important incident, to such declaration. In other words, the incident is constitutionally provided for, while the substance, or general principle, is merely recognised, but in no other manner alluded to. Probably the framers of that instrument saw the difficulty of attempting to regulate, by any fixed rules, that which results from paramount necessity alone, and which, from its very nature, is scarcely susceptible of minute regulation. Practically, in England and the United States, the essence of Martial law is the suspension of the privilege of the writ of *habeas corpus*—that is, the withdrawal of a particular person, or of a particular place or district of country, from the authority of the civil tribunals. A mere declaration of Martial law, no matter how much, 'in case of rebellion or invasion, the public necessity may require it,' would be utterly useless unless accompanied by a suspension of the privileges of the writ of *habeas corpus* ; for if the local civil authorities were permitted, in such a case, to enforce this writ, they might, and some probably would, render the military powerless to provide for 'the public safety.' Hence, in the United States, the two—Martial law

Martial
law in the
United
States

¹ Block, *Dic. de l'Admin. Française*, passim ; Escriche, *Dic. de Leg. y Jurisprudencia*, passim ; Cushing, *Opinions of U.S. Attys.-Genl.*, vol. viii. pp. 366 et seq. ; Stephen, *Commentaries*, vol. ii. p. 602 ; Hansard, *Parl. Deb.*, N. S., vol. xi. ; third series, vol. cxv. ; Grant v. Gould, 2 *H. Blackst R.*, 98 ; Bowyer, *Universal Public Law*, p. 424

and the suspension of the writ—although differing as the whole differs from a part, have been practically regarded as one and the same thing.¹

Suspension of
habeas
corpus

§ 30. There has not been, so far as we are aware, any authoritative decision of the Supreme Court of the United States on the authority necessary to suspend the *habeas corpus*, for the question was not raised in *ex parte* Bollman and Swartout,² but the inferior courts have generally held that the direct action of the legislative power is necessary in all cases to authorise the suspension, and that, without this essential prerequisite, they would enforce the writ in all places, against all persons, and under all circumstances whatsoever. It should be remarked, however, that some of these opinions have been given in cases of conflict between the courts and the executive or military authorities, where passions were excited, and where the judges appeared more anxious to exercise their own prerogatives than to preserve and sustain the government of their country. Judicial opinions given under such circumstances are entitled to very little weight. The judges who

¹ By Act of Congress, March 3, 1863, it was enacted that, during the rebellion, the President of the United States, whenever in his judgment the public safety might require it, was authorised to suspend the privilege of the writ of *habeas corpus* in any case, throughout the United States, or any part thereof. And whenever, and wherever, the said privilege should be so suspended, no military or other officer should be compelled, in answer to any writ of *habeas corpus*, to return the body of any person or persons detained by him by authority of the President; but, upon the certificate under oath of the officer, having charge of anyone so detained, that such person was detained by him as a prisoner, under authority of the President, further proceedings under the writ of *habeas corpus* should be suspended by the judge or court who had issued the writ, so long as such suspension by the President should remain in force, and the rebellion continue. See Egan's case (13 *Pittsb. Leg. J.*, 514) as to the effects of martial law in the United States, and when it may be declared.

A person who was a resident, during the civil war of 1861-65, of a loyal State, in which he was then arrested, who was never resident in any State engaged in rebellion, nor connected with the confederate military or naval service, could not, according to the Supreme Court of the United States, be regarded as a prisoner of war, within the meaning of the Act of March 3, 1863, authorising, on certain conditions, the discharge from imprisonment of persons held 'otherwise than as prisoners of war.'—(Supreme Ct.) *Ex parte* Milligan, 4 *Wall.*, 2.

In May 1865 the Attorney-General of the United States gave his opinion, that the persons implicated in the murder of President Lincoln, and in the attempted assassination of the Hon. William H. Seward, Secretary of State, and further implicated in an alleged conspiracy to assassinate other officers of the Federal Government, at Washington, together with their aiders and abettors, could be lawfully tried before a military commission.

² 4 Cranch, *R.*, pp. 75-101 (1807).

rendered these decisions seem to have overlooked the fact that *war*, resulting from rebellion or invasion, is, from its very nature, a substitution of military for civil authority. That the latter authorities do not and cannot perform their ordinary functions, is to be presumed from the fact that war exists; for if the courts could enforce the laws there would be no occasion for the action of the military power, and there could be, constitutionally and legally, no *war*. Moreover, when a military force is called out to repel an 'invasion,' or to suppress a 'rebellion,' it is not placed under the direction of the judiciary, but under that of the executive. Suppose the military force, legally and constitutionally called into service for the purposes indicated, should find it necessary, in the course of its military operations, to occupy a field or garden, or to destroy trees or houses belonging to some private person, can a court, by injunction, restrain them from committing such waste? It can do so in time of peace; and if its powers are to continue in time of war, the judiciary, and not the executive, will command the army and navy. The taking or destroying of private property in such cases is a military act—an act of war, and must be governed by the laws of war; it is not provided for by the laws of peace. In the same way, a person taken and held by the military forces, whether before, or in, or after a battle, or without any battle at all, is virtually a *prisoner of war*.¹ During the administration of President Washington, in the Pennsylvania 'Whisky Insurrection' of 1794 and 1795, the military authorities engaged in suppressing it disregarded the writs which were issued by the courts for the release of the prisoners who had been captured as insurgents. General Wilkinson, under the authority of President Jefferson, during the Burr conspiracy of 1806, suspended the privilege of this writ, as against the Superior Court of New Orleans. General Jackson assumed the right to refuse obedience to the writ of *habeas corpus*, first in New Orleans, in 1814, as against the authority of Judge Hall, when the British army was approaching that city; and afterwards in Florida, as against the authority of Judge Fromentin. The case of General Wilkinson was brought directly to the notice of Congress, but as that body

¹ *Luther v. Borden*, 7 *How. R.*, 1; *Martin v. Mott*, 12 *Wheat. R.*, 19; *Story, Com. on the Constitution*, § 1342; *Johnson v. Duncan et al.*, 3 *Martin R.*, O. S., p. 530.

refused either to approve or to disapprove his conduct, it has been claimed that this non-action of the national legislature was a tacit acquiescence in the power of the President to authorise the suspension of this writ, 'when in case of rebellion, or invasion, the public necessity may require it.'¹

Power of
the
President
of the
United
States

§ 31. But suppose it should be definitively decided that Congress alone is empowered to suspend the privilege of this writ, and cases of 'rebellion or invasion' should occur, where an imperious overruling public necessity required, from the President, or those under his authority, an exercise of this power, must he disregard 'the public safety,' and permit a judge, who is armed with this writ, to endanger or destroy the government? Even if it were plain that the words of the constitution were intended to give this power *exclusively* to Congress, we think that in a case of public danger, at once so imminent and grave as to admit of no other remedy, the maxim *salus populi suprema lex* should form the rule of action, and that a suspension of this writ, by the executive and military authorities of the United States, would be justified by the pressure of a visible public necessity; if an act of indemnity were required, it would be the duty of Congress to pass it.²

¹ Parton, *Life of Jackson*; Hamilton, *Hist. of the Republic*, vol. vi.; Wilkinson, *Memoirs*.

² Cushing, *Opinions of U. S. Attorneys-Gen.*, vol. viii. pp. 365 et seq. In 1794 Mr. Grey drew the attention of the House of Commons to the fact that foreign troops were suffered to be landed in England without the consent of Parliament, and that the same was contrary to the Bill of Rights, but the case was defended by the Government on the ground that the prohibition merely extended to time of peace, not to time of war. (Massey, *Hist. of Eng.*, vol. ii. p. 52.)

CHAPTER XVIII

MEANS AND INSTRUMENTS FOR CARRYING ON WAR

1. Duty to serve and defend the State—2. Persons exempt from military duty—3. If such persons engage in hostilities—4. In whom is vested the right to raise troops—5. Duty of a State to support its troops—6. Pensions, asylums, hospitals, &c.—7. Use of mercenaries—8. Of partisans and guerrilla troops—9. Insurgent inhabitants and levies *en masse*—10. Hostile acts of private persons—11. Implements of war—12. Use of poisoned weapons—13. Poisoning wells, food, &c.—14. Assassination of an enemy—15. Surprises—16. Allowable deceptions—17. Stratagems—18. Use of a false flag at sea—19. Deceitful intelligence—20. Employment of spies—21. Cases of Hale and André—22. Rewarding traitors—23. Intestine divisions of enemy's subjects.

§ 1. AS a general rule, every citizen is bound to serve and defend the State of which he is a member, as far as he is capable. Duty to
serve and
defend the
State This concurrence, for the common defence and general security, is one of the principal objects of every political association, and without this, society could not be maintained. When, therefore, a State has declared war, every citizen is bound to assist in carrying it to a successful conclusion, whatever may be his individual opinion of the necessity or propriety of the resort to arms by his own Government. Even though he may not deem the objects of the war justifiable, or its motives commendable, he is, nevertheless, bound to stand by the State in the prosecution of that war. This, however, will not prevent his directing his best efforts and influence to bring about a just and satisfactory settlement of the causes of the war. If he thinks that his own Government has entered into the contest rashly and inconsiderately, he may seek to convince it of its error, and to induce a withdrawal or modification of its pretensions, and a concession of some of the enemy's demands ; but, however justifiable and proper his efforts to restore peace, till this is effected the State is entitled to his services in carrying on the war.

A Conference of the principal European Powers met at Brussels, in 1874, to formulate international rules for the guidance of armies in time of war. The British Government refused to enter into any discussion concerning the rules of Law, by which the relations of belligerents are guided, or to undertake any new obligations or engagements in regard to general principles. A British delegate was, however, sent, on the distinct assurance from the Powers invited to take part in the Conference, that the delegates would be instructed to confine themselves to the consideration of details of military operations of the nature of those dealt with in the Project of the Russian Government, and would not entertain in any shape, directly or indirectly, anything relating to maritime operations or naval warfare. When the more important articles of the Project came to be examined and discussed, instead of mere rules for the guidance of military commanders based upon usage, upon which a general understanding could be shown to be desirable in the interests of humanity, the articles were seen to contain or imply numerous innovations, for which no practical necessity was proved to exist, and the result of which would have been greatly to the advantage of Powers having large armies, constantly prepared for war, and systems of compulsory military service. The British Government, therefore, on the conclusion of the Conference, refused to pursue or to take part in any further negotiations concerning it. They regarded the result to have been to demonstrate that there was no possibility of an agreement upon the really important articles of the Russian Project, that the interests of the invader and the invaded are irreconcilable, and that even, if certain rules of warfare could be framed in terms which would meet with acquiescence, they would prove to exercise little more than a fictitious restraint, an evil deprecated by the Russian Government at the opening of the Conference.

These rules have not been adopted by any nation ; they will be found in full in the appendix to chapter xxix.

Certain
classes
usually
exempted

§ 2. Although every man, capable of bearing arms, is bound to take them up if required, in the service of the State, this duty is limited and regulated by municipal law. At present most nations maintain regular military and naval forces, which are increased in time of war by volunteers, militia, or new

levies. Moreover, the soldiers and sailors required for carrying on military operations are, in Great Britain and the United States, enlisted without compulsion, which greatly mitigates the evils of war. Even where levies are made to fill up the ranks of the army, or to supply the navy, the great body of the people are, as a rule, left to pursue their ordinary peaceful avocations. Occasionally the public authorities of particular places call out all citizens capable of carrying arms; but even then there are certain classes exempt from military duty. Old men, women and children are unfit for the occupation of war, being incapable of handling arms, or of supporting the fatigues of military service. Magistrates, and other civil officers, are exempt, their time being occupied in the administration of justice and the maintenance of order. The clergy are also usually exempted from military service, the duties of their profession being deemed incompatible with those of war. All these classes, which, by general usage, or the municipal laws of the belligerent State, are exempt from military duty, are not subject to the general rights of a belligerent over the enemy's person. To these are added, by modern usage, all persons who are not organised or called into military service, though capable of its duties, but who are left to pursue their usual pacific avocations. All these are regarded as *non-combatants*.

§ 3. Nevertheless, it often happens, in case of invasions and in the siege of fortified towns, that not only merchants, mechanics, and the common peasantry, but also the clergy, magistrates, old men, women, and even children, take up arms and render good service in the common defence. In doing this they lose the character of *non-combatants*, and become subject to the ordinary rules of war. Those who lay aside their peaceful avocations and engage, either directly or indirectly, in hostile acts towards the enemy, whether by the orders of their Government, or their own free will, are liable to the consequences which lawfully result from such acts, but to none others.¹

¹ Vattel, *Droit des Gens*, liv. iii. ch. ii. § 10; ch. viii. § 145; Burlamaqui, *Droit de la Nat. et des Gens*, tome v. pt. iv. ch. i.; Phillimore, *On Int. Law*, vol. iii. §§ 70, 94; De Félice, *Droit de la Nat.*, &c., tome ii. lec. 20, 25; Riquelme, *Derecho Púb. Int.*, lib. i. tit. i. cap. x.; Réal, *Science du Gouvernement*, tome v. ch. ii. sec. vi. § 8; Bello, *Derecho Internacional*, pt. ii. cap. iii. § 4.

**Power to
raise
troops**

§ 4. 'As war cannot be carried on without soldiers,' says Vattel, 'it is evident that whoever has the right of making war, has also naturally that of raising troops.' This is true with respect to the State in its sovereign capacity, but not with respect to the particular departments into which the government of the State is divided. The Constitution must determine to what department these powers shall belong, and whether they shall be combined or separate. In most European countries they both belong to the sovereign, and are regarded as prerogatives of majesty. In England the sovereign declares war, but he cannot compel persons to enlist, nor can he, in fact, keep an army on foot without the concurrence of Parliament, evidenced by a yearly statute, extending the provisions of the Army Act, 1881, for one year only, from the date of such yearly statute. In the United States, Congress alone can declare war, or authorise the raising of troops. The general right of a State to raise troops is a part of the *jus eminens*, or superior right, which the entire body may, for the common good, exercise over the individual members of which it is composed.¹

**Duty of
a State to
support
its troops**

§ 5. If every citizen, as among the Romans, took his turn in serving in the army, such service would naturally be gratuitous. But where only a portion are called into military service, while the others are left to pursue their ordinary avocations, it is right and proper that those who bear arms should be paid by those who do not, for no individual is bound to do more than his proportion for the service and defence of the State. The duty of the State to support its troops is evident, and its right to levy taxes for this purpose results from its general sovereign power over property within its territory, when necessity or the public good requires. It is a part of the *jus eminens*, which, when it regards property, is called by writers on public law *dominium eminens*. This right has, by some, been placed on the ground of an implied consent of individuals to part with a portion of their property for the public good, while others regard it as arising from the obligations of natural equity, the obligation to contribute to the support of the Government being similar to other obligations

¹ The United States, by Acts of August 6, 1861, 12 Stat. at L. 319, and July 17, 1862, 12 ib. 591-9, declared that the slaves of rebels were free, and might be employed in the civil war by the Federals.

of secondary natural law, resulting as consequences from the institution of civil society.¹

§ 6. The rights and duties of a State, with respect to the support of its soldiers, are not limited to the time of their actual service in bearing arms ; the provisions made for their support in old age, or when disabled by toil, sickness, or wounds—such as pensions, asylums, hospitals, &c.—are, therefore, regarded as constituting a part of their military pay ; and the extent of these provisions generally determines the character of the State, and of its citizens, for humanity, generosity, and good government. A country which does not properly support and pay those who bear arms in its service, will soon find itself without the means of defence, and a Government which leaves those who have wasted their strength, and shed their blood in its service, to beg their bread or perish with want, deserves, as it will always receive, the contempt of every noble and generous heart. Moreover, if the State neglect to provide for its troops regularly and systematically, they will provide for themselves by pillage, robbery and massacres while in the field, and by a subversion of the civil government on the return of peace. It is only, with respect to their conduct in war, that the provisions made by State for the support of its troops become matters of serious international interest. The horrible atrocities committed by the unpaid troops of the middle ages form the most bloody pages in the annals of history.²

§ 7. Foreigners, who voluntarily serve a State for stipulated pay, are called *mercenaries*. The right of citizens of one State to be so employed by another, and of this other to so employ them, has often been discussed by publicists.³ That any citizen, with

¹ Grotius, *De Jure Bell. ac Pac.*, lib. i. cap. i. § 6.

² Hallam, *Middle Ages*, ch. ii.

³ By the common law of England it is an indictable offence to enter the service of a foreign Government without leave of the sovereign. During the contest between Don Carlos and Isabella, the late Queen of Spain, the Foreign Enlistment Act (59 Geo. III. c. 69) was suspended, to allow British subjects to join the auxiliary legion raised in England for the cause of that queen in 1835. Sir George Sartorius and Rear-Admiral Sir Charles Napier commanded the navy of Donna Maria during her contest for the throne of Portugal in 1827. On the other hand, during the Crimean war (1855), the British Government raised a German and an Italian legion. By Order in Council, August 30, 1862, the British Foreign Enlistment Act was suspended so far as to enable Captain Osborn and Mr. Lay to enter the service of the Emperor of China, to fit out, equip, purchase, and acquire ships or vessels of war for the use of the said Em-

the consent of his own State, may serve another, cannot be denied. But, in doing this, he changes his nationality, and must thereafter look for support and protection to the State in whose service he is engaged. The right of a State to permit its citizens to be employed in the military service of another is very questionable, but the right of this other to so employ them (with such permission) cannot be doubted. The *policy* of doing so is a very different question. Mercenaries enlist voluntarily, for no State has a right to require such service of undomiciled foreigners. Domiciled foreigners may be required to do duty in the militia, or the civic and national guards,¹ for the preservation of order and the enforcement of peror, and to engage and enlist British subjects to enter the military and naval service of the said Emperor. This permission was to remain in force till September 1, 1864. This licence, with the same limitation, was extended to all military officers in her Majesty's service.

By 33 & 34 Vict. c. 90 (Foreign Enlistment Act, 1870) a person, being a British subject, who without the licence of her Majesty, within or without British dominions, accepts any commission or engagement from a foreign State at war with any foreign State at peace with her Majesty, is liable to fine and imprisonment; and the same, whether a British subject or not, if he induces within her Majesty's dominions any other person to accept such commission or engagement.

¹ In 1861, during the American civil war, the British Government declared that if enforced enlistments of British subjects for the war were persisted in, the Government would be obliged to concert with other neutral powers for the protection of their respective subjects; but neither in the Northern nor Southern States was the discharge of any British subject, enlisted against his will, refused on proper representation. The British Government intimated that if the United States permitted no alternative of providing substitutes, the position of British subjects to be embodied in that militia would 'call for every exertion being made in their favour on the part of her Majesty's Government.' The British Government, in 1862, informed the United States Government that as a general principle of international law neutral aliens ought not to be compelled to perform any military service (i.e. working in trenches), but that allowance might be made for the conduct of authorities in cities under martial law, and in daily peril of the enemy; and in 1864 the British Government saw no reason to interfere in the case of neutral foreigners directed to be enrolled as a local police for New Orleans. By the Act of April 14, 1862, naturalised aliens in the United States are entitled to nearly the same rights, and are charged with the same duties, as the native inhabitants; and aliens not naturalised, if they have at any time assumed the right of voting at a State election, or held office, are, according to the opinion of Mr. Attorney-General Bates, liable to the Acts for enrolling the national forces. (See also Act, March 3, 1863, and Act, February 24, 1864; proclamation of President, May 8, 1863.) This was acted on during the American civil war, and tacitly acquiesced in by the British Government.

In England civic and national guards are unknown, and now service in the militia and yeomanry is, in practice, voluntary; but when it was enforced it seems never to have been authoritatively decided whether an alien could be obliged to serve therein or not. Aliens, even if natura-

the laws, within a reasonable distance of their place of domicile. But such duty is rather of a civil than a military character. It does not include service against a foreign enemy, nor general military service in a civil war.¹

§ 8. Partisan and guerrilla troops are bands of men, self-organised and self-controlled, who carry on war against the public enemy, without being under the direct authority of the State. They have no commissions or enlistments, nor are they enrolled as any part of the military force of the State; and the State is, therefore, only indirectly responsible for their acts. As a general rule, it will neither recognise their acts nor attempt to save them from the punishment due for their violations of the laws of war. At most, the Government only winks at their crimes, while it profits by their depredations upon the enemy. Questions have sometimes arisen, whether a State can properly make use of such forces, and whether, when taken by the other belligerent, they are to be treated as ordinary prisoners of war. The answer to the first question is obvious. If authorised and employed by the State, they become a portion of its troops, and the State is as much responsible for their acts as for the acts of any other part of its army.²

Partisan
and
guerrilla
troops

lised, are exempt from serving the office of parish constable. (*R. v. Ferdinand de Mierre*, 5 *Burr.* 2790.) Nor can they be obliged to serve as special constables, but, if willing to act, they are capable of being appointed (5 and 6 Will. IV. c. 43); it is interesting to note, as an example of this, that Louis Napoleon (afterwards Napoleon III.) did duty as a special constable in Fitzroy Square, London, in April 1848.

¹ Bynkershoek, *Quæst. Jur. Pub.*, lib. i. cap. xxii.; Bello, *Derecho Internacional*, pt. ii. cap. i. § 5; Ward, *Law of Nations*, vol. ii. p. 301; Heffter, *Droit International*, § 62.

² In 1870 the Prussians required each French franc-tireur to wear a uniform recognisable at gun-shot distance, and the distinctive marks of such uniform to be inseparable from his person. In this case he would be treated as an enemy of war. A corps of francs-tireurs, 'Les Partisans de Gers,' had papers showing that they were in the Government service; their officers held commissions, and their military character was admitted, though their only distinctive marks were a red sash, black coat, and Calabrian hat. A notice at St. Mihiel declared that francs-tireurs or other persons bearing arms, but not wearing uniforms so as to distinguish them from the civil population, were by the 'Prussian laws of war' punishable with death. Another notice at Vendresse declared that persons in plain clothes fighting without papers or authorisation from their Government would be tried by court martial, and sentenced to ten years' imprisonment, or, in aggravated cases, executed.

The German governors punished with death everyone who should take up rails or place obstacles on the lines of railway, or, when the offender could not be discovered, imposed a fine of 1,000 thalers on the nearest commune. No case presented itself during the war of 1870 which had not been provided for in the American instructions (see appendix to

They are no longer partisans and guerrilleros, in the proper sense of those terms, for they are no longer self-controlled, but carry on hostilities under the direction and authority of the State. The solution to the second question may not be quite so obvious. It will, however, readily be admitted that the hostile acts of individuals, or of bands of men, without the authority or sanction of their own Government, are not legitimate acts of war, and, therefore, are punishable according to the nature or character of the offence committed. The taking of property by such forces, in offensive hostilities, is not a belligerent act authorised by the law of nations, but a *robbery*. So, also, the killing of an enemy by such forces, except in self-defence, is not an act of war, but a *murder*. The perpetrators of such acts, under such circumstances, are not enemies, legitimately in arms, who can plead the laws of war in their justification, but they are robbers and murderers, and, as such, may be punished. Their acts are unlawful ; and, when captured, they are not treated as prisoners of war, but as criminals, subject to the punishment due to their crimes. Hence, in modern warfare, partisan and guerrilla bands, such as we have here described, are regarded as outlaws, and, when captured, may be punished the same as freebooters and banditti. As examples, we refer to the conduct and punishment of the guerrilla bands, in Spain, during the Peninsular War, and by General Scott, in Mexico, during the war between that republic and the United States.¹

Guerrilla
bands to
be distin-
guished
from levies
en masse

§ 9. Some have attempted to apply this rule to inhabitants who, under the authority of the State, rise *en masse*, and take arms to repel an invasion. The distinction between the two cases is too manifest to require an extended discussion. In the kind of guerrilla warfare before spoken of, the individuals composing the bands acknowledge no authority but that of their own chiefs. They derive no authority from the State, and the State is no more responsible for their acts

ch. xx. vol. ii.), except, perhaps, the offence of concealing, in an occupied district, arms or provisions for the enemy. This offence was punished by the United States during the civil war by sacking and burning any house in an occupied district found to contain such stores. In France, the village in an occupied district, harbouring francs-tireurs or troops of that character, was set on fire.

¹ Kent, *Com. on Am. Law*, vol. i. p. 94 ; Vattel, *Droit des Gens*, liv. iii. ch. xv. § 226 ; Phillimore, *On Int. Law*, vol. iii. § 96 ; Klüber, *Droit des Gens*, § 267 ; Hautefeuille, *Des Nations Neutres*, tit. iii. ch. ii. ; Scott, *General Orders*, No. 372, December 12, 1847.

than for the unauthorised acts of any other subjects. But, in the case of a levy *en masse*, the inhabitants are organised and armed under the direction of the public authorities, and the State is directly responsible for their acts.¹ In guerrilla warfare the individual alone is responsible for his acts, but where the mass of the people of a city or district bear arms under the direction of the Government, they have become a legitimate part of the army, and the whole State is chargeable with any breach of the laws of war which they may commit. Any non-combatant may become a combatant without incurring any other penalty than that of being made subject to the laws applicable to active belligerents. If captured, they are entitled to the treatment of ordinary prisoners of war. The law of nations has, not unfrequently, been violated in European wars by disregarding the distinction which we have here pointed out between the unauthorised acts of self-constituted guerrilla bands, and the authorised acts of levies *en masse*, organised and armed under the authority of the State. The French generals, in the Peninsular War, often punished alike all Spanish peasants found in arms, whether or not under the authority and direction of their own Government. And, in the invasion of France, in 1814, the Allies punished with death the armed French peasants, although they had been levied and forced to bear arms by the local authorities, under the proclamations of the emperor. The proper distinction was made by Wellington, in his invasion of the south of France, in 1814. The troops of Mina and Morillo committed the greatest excesses in plundering the French peasants. This conduct was severely rebuked by Wellington. 'A sullen obedience followed,' says Napier, 'for the moment, but the plundering system was soon resumed, and this, with the mischief already done, was sufficient to arouse the inhabitants of Bidarray, as well as those of the Val de Baigorri, into action. They commenced and continued a partisan warfare until the Duke of Wellington, incensed by their activity, issued a proclamation calling upon them *to take arms openly and join Soult, or stay peaceably at home, declaring he would otherwise burn their villages and hang all the inhabitants* . . . Thus it happened that, notwithstanding all the outcries made against the French

¹ See 'American Instructions,' arts. 51 and 52 (appendix to ch. xx. *infra*), vol. ii.

for resorting to this system of repressing the warfare of peasants in Spain, it was considered by the English general both justifiable and necessary. However, the threat was sufficient for the occasion.¹

Hostilities
waged by
private
persons

§ 10. A distinction is sometimes drawn between hostilities of private persons on land and on the high seas, but it does not seem to rest upon a substantial foundation, or to be supported by satisfactory reasons. The case is fully presented in the following extract from the commentaries of Chancellor Kent: 'Although a state of war,' he says, 'puts all the subjects of one nation in a state of hostility with those of the other, yet, by the customary law of Europe, every individual is not allowed to fall upon the enemy. If subjects confine themselves to simple defence, they are to be considered as acting under the presumed order of the State, and are entitled to be treated by the adversary as lawful enemies; and the captures which they make, in such a case, are allowed to be lawful prize. But they cannot engage in offensive hostilities, without the express permission of the sovereign; and if they have not a regular commission, as evidence of that consent, they run the hazard of being treated by the enemy as lawless banditti, not entitled to the mitigated rules of modern warfare.' This subject will be fully discussed in chapter xxii.

Imple-
ments of
war

§ 11. The implements of war, which may be lawfully used against an enemy, are not confined to those which are openly employed to take human life, as swords, lances, fire-arms, and cannon; but also include secret and concealed means of destruction, as pits, mines, &c. So also of new inventions and military machinery of various kinds; we are not only justifiable in employing them against the enemy, but also, if possible, in concealing from him their use. During the Franco-Austrian war (1859) the battle of Montebello was mainly won by the French, through the support they received in the continual arrival of fresh troops by railway, each train disgorging its hundreds of armed men and immediately hastening back for more. Every great discovery in the art of war has a life-saving and peace-promoting influence. The effects of the invention of gunpowder are a familiar proof of this remark, and the same principle applies to the discoveries

¹ Napier, *Hist. of Peninsular War*, b. xxiii. ch. iii.; Alison, *Hist. of Europe*, ch. lxxiv. vol. iv. p. 329; Manning, *Law of Nations*, p. 153.

of modern times. By perfecting ourselves in military science (paradoxical as it may seem) we are therefore assisting in the diffusion of peace, and hastening the approach of that period when 'swords shall be beaten into ploughshares, and spears into pruning-hooks; when nation shall not lift up sword against nation, neither shall they learn war any more.' At one period, however, it was considered contrary to the rules of military honour and etiquette to make use of unusual implements of war. Thus the French Vice-Admiral, Marshal Conflans, issued an order of the day, on November 8, 1759, forbidding the use of hollow shot against the enemy, on the ground that it was not generally employed by polite nations, and that the French ought to fight according to the rules of honour. The same view was taken of the use of hot shot, grape, chain shot, split balls, &c.¹

§ 12. But, while the laws of war allow the use of new invention of arms, or other means of destruction, against the life and property of an enemy, there is a limit to this rule beyond which we cannot go. It is necessity alone that justifies us in making war and in taking human life, and there is no necessity for taking the life of an enemy who is disabled, or for inflicting upon him injuries which in no way contribute to the decision of the contest. Hence we are forbidden to use poisoned weapons, for these add to the cruelties and calamities of a war, without conducing to its termination. We may wound an enemy in order to disable him, but when so disabled we have no right to take his life; we, therefore, cannot introduce poison into that wound, so as, subsequently, to cause his death. By a Declaration between Great Britain, Austria, Bavaria, Belgium, Denmark, France, Greece, Italy, Netherlands, Persia, Portugal, Prussia and the North German Confederation, Russia, Sweden and Norway, Switzerland, Turkey, and Würtemberg, signed at St. Petersburg, December 11, 1868, the contracting

Use of
poisoned
weapons

¹ B. F. Butler, *Address on the Military Profession*, p. 25; Ortolan, *Diplomatie de la Mer*, liv. iii. ch. i.

The 'Tourterelle' French ship in an action with the 'Lively' used red-hot shot. The employment of hot shot is not usually deemed honourable warfare; but the blame, if any, rested with those who had equipped the ship for sea. (James, *Nav. Hist.* vol. i. 283.) Among the langridge which the American privateer, the 'General Armstrong,' used in 1814, against the boats of the British ships 'Plantagenet' and 'Rota,' were nails, brass buttons, knife blades, &c.; and the consequence was that the wounded suffered excruciating pain before they were cured. (*Ibid.* vol. vi. 350.)

parties engaged to renounce, in case of war among themselves, the employment by their military or naval troops of any projectile of a weight below 400 grammes, which is either explosive, or charged with fulminating or inflammable substances. This engagement does not oblige when, in a war between contracting or acceding parties, a non-acceding party shall join one of the belligerents. 'It is with good reason,' says Vattel, 'and in conformity with their duty, that civilised nations have classed, among the laws of war, the maxim which prohibits poisoning of arms.'¹ Grotius forbids the doing violence to women or to the dead, making slaves of prisoners, the wanton ravage of a country, or the destruction of buildings and public monuments.² The use of barbarian troops in a war between civilised nations appears to be tolerated, but due precaution should be taken by those employing them that such troops in no way outrage the laws of war. Russia brought Circassians into Hungary in 1848, and towards the end of the Crimean war (1855) she was preparing to arm some savage races within her empire. The French employed savages against the British in America; the British, notwithstanding Lord Chatham, did the same against their revolted colonists; the French Government employed the Turcos against the Austrians in 1859, and against the Prussians in 1870. The last example was the employment of Bashi-Bazouks by Turkey against the Servians in 1876.

Poisoning
wells,
food, &c.

§ 13. The practice of poisoning wells, springs, waters, or any kind of food, for the purpose of injuring an enemy, is now also universally condemned. In addition to the reasons given for prohibiting the use of poisoned weapons, there is the additional one, that by poisoning waters and food, we may destroy innocent persons, and non-combatants. The practice is, therefore, condemned by all civilised nations, and any State or general who should resort to such means would be regarded as an enemy to the human race, and excluded from civilised society.³ So also every act of man against the bounty of

¹ Vattel, *Droit des Gens*, liv. iii. ch. viii. § 156.

² Grotius, b. iii. ch. iv.

³ Grotius, *De Jure Bell. ac Pac.*, lib. iii. cap. iv. § 17; Lieber, *Political Ethics*, b. vii. §§ 24, 25; Rayneval, *Inst. du Droit Nat.*, &c., liv. iii. ch. iv.; Heffter, *Droit International*, § 125; Burlamaqui, *Droit de la Nat. et des Gens*, tome v. pt. iv. ch. vi.; De Cussy, *Droit Maritime*, liv. i.

Providence, is not justified by the laws of war. Great Britain protested, in 1862, against the sinking of large ships laden with stone on banks of mud in the Maffitt's Channel, of Charleston Harbour, by the Federal Government of the United States, on the ground that it would end in the permanent destruction of the harbour. The French Government were of the same opinion as Great Britain. The Government of the United States decided, in view of the above protest, to sink no more stone ships in the harbour.

§ 14. Not unfrequently the success of a campaign, or even the termination of the war, depends on the life of the sovereign, or of the commanding general. Hence, in former times, it sometimes happened that a resolute person was induced to steal into the enemy's camp, under the cover of a disguise, and having penetrated to the general's quarters, to surprise and kill him. Such an act is now deemed infamous and execrable, both in him who executes, and in him who commands, encourages, or rewards it. The consuls Caius Fabricius and Quintus Æmilius rejected with horror the proposal of Pyrrhus's physician to poison his master, and cautioned that prince to be on his guard against the traitor. The proposal of the Prince of the Catti to destroy Arminius was rejected, although Arminius had treacherously cut off Varus, together with three Roman legions, both the Senate and Tiberius deeming it unlawful to poison even a perfidious enemy. It was on the same principle that Alexander formed his judgment of Bessus, who had assassinated Darius. During the middle ages, however, war degenerated into cruelty and barbarism, and poisons and assassinations were frequently resorted to. The assassination of William, Prince of Orange, by the Spaniards, in the war of the Netherlands, is now regarded with universal detestation. But this detestation of the civilised world is not confined to the perpetrators of such acts; those who command, encourage, countenance, or reward them, are equally execrated; and a Government, or a general, who should neglect to punish a subject, or a subordinate, for such a crime would be justly regarded as odious.¹

tit. iii. § 24. See the account of mixing belladonna with the drink the Scots supplied to the Danes (*Gardener's Dictionary*, s.v. 'Belladonna'; and Buchanan's *Rerum Scoticarum Lib. VII.*

¹ In 1806 a foreigner waited on Mr. Fox, then Secretary of State, and made an offer of assassinating Bonaparte, if it met with the approbation

Assassi-
nation, &c.

Surprises

§ 15. But we must distinguish between a treacherous murder and a surprise, which is always allowable in war. A small force, under cover of the night, may pass the enemy's lines, penetrate to his head-quarters, surprise the general, and take him prisoner, or attack and kill him. It was his duty to guard against such attacks, and to prevent a surprise. Such acts are therefore not only justifiable but commendable ; it is the disguise and treachery which give to the deed the character of murder or assassination. The conduct of Leonidas and the Lacedæmonians, who broke into the enemy's camp and made their way directly to the Persian monarch's tent, was justified by the common rules of war, and did not authorise the king to treat them more rigorously than any other enemies. The act of Mucius Scævola, in entering, in disguise, the tent of Porsenna with the intention of killing him, was praised by the age in which he lived, but would not be justified by the rules of modern warfare.

Allowable deceptions

§ 16. War makes men public enemies, but it leaves in force all duties which are not *necessarily* suspended by the new position in which men are placed towards each other. Good faith is, therefore, as essential in war as in peace, for without it hostilities could not be terminated with any degree of safety, short of the total destruction of one of the contending parties. This being admitted as a general principle, the question arises how far we may deceive an enemy, and what stratagems are allowable in war ? Whenever we have expressly or tacitly engaged to speak the truth to an enemy, it would be perfidy in us to deceive his confidence in our sincerity. But if the

of the English Ministry. Mr. Fox had the man secured, and wrote to M. Talleyrand, the French Minister for Foreign Affairs, informing him of the circumstance. 'I gave orders to the police officer who accompanied him to send him out of the kingdom as soon as possible ;' but afterwards 'I saw my error in having suffered him to depart, without having previously informed you, and I ordered him to be detained. Our laws do not permit us to detain him long ; but he shall not be sent away, till after you shall have had full time to take precautions against his attempts ; when he goes, I shall take care to have him landed at a seaport as remote as possible from France. He calls himself Guillet de la Gevriillière.' Mr. Fox evidently intended to deal with this spy under the Alien Act (43 Geo. III. c. 155). It is, however, open to doubt whether this spy may not have been sent by Bonaparte himself, to test the newly-appointed statesman. He has been said to have been for ten years the Emperor's secret agent, to have been sent to Warsaw in 1804, to poison Louis XVIII., and to have been mixed up in the disturbances at Vienna the following year ; and after his return from England on this occasion to have been employed by Bonaparte in Germany, Spain, and Portugal.

occasion imposes upon us no moral obligation to disclose to him the truth, we are perfectly justifiable in leading him into error, either by words or actions. Feints and deceptions of this kind, are always allowable in war. It is the breach of good faith, express or implied, which constitutes the perfidy, and gives to such acts the character of *lies*.¹

§ 17. *Stratagems* in war are snares laid for an enemy, or deceptions practised on him without perfidy, and consistent with good faith. They are not only allowable, but have often constituted a great share of the glory of the most celebrated commanders. 'Since humanity obliges us,' says Vattel, 'to prefer the gentlest methods in the prosecution of our rights, if by a stratagem, by a feint devoid of perfidy, we can make ourselves masters of a strong place, surprise the enemy, and overcome him, it is much better, and is really more commendable, to succeed in this way than by a bloody siege, or the carnage of a battle. These feints, or pretended attacks, are frequently resorted to, and men and ships are sometimes so disguised as to deceive the enemy as to their real character, and by this means enter a place or maintain a position advantageous to their plan of attack or of battle. But the use of stratagems is limited by the rights of humanity and the established usages of war. Even if devoid of perfidy, and consistent with the faith due to the enemy, they must not violate commercial usage, or contravene the stipulations of particular treaties. Vattel alleges that in the war of 1756 an English frigate appeared off Calais, and made signals of distress, with a view of decoying out some vessel, and actually seized some sailors who generously came to her assistance. If the fact be true, that unworthy stratagem deserved a severe punishment, for making signals of distress is asking assistance, and by that very action promising perfect security to those who give the friendly succour. The action attributed to that frigate implies an odious perfidy, but no trace can be found of the occurrence. The following example, however, has been verified by affidavit made before the (colonial) mayor of New

¹ Phillimore, *On Int. Law*, vol. iii. § 94; Vattel, *Droit des Gens*, liv. iii. cc. viii. x.; Lieber, *Political Ethics*, b. vii. §§ 24, 25; Grotius, *De Jure Bell. ac Pac.*, lib. iii. cap. viii. §§ 4, 5; Puffendorf, *De Jure Nat. et Gent.*, lib. viii. cap. vi. § 6; Garden, *De la Diplomatie*, liv. vi. § 7; Bello, *Derecho Internacional*, pt. ii. cap. vi. §§ 1, 2; Bynkershoek, *Quaest. Jur. Pub.*, lib. i.

York, February 13, 1783. In that year the 'Sybille,' a French frigate of thirty-eight guns, Captain le Comte de Kregaron de Soemaria, enticed the British ship 'Hussar,' twenty guns, Captain J. M. Russell, by displaying an English ensign reversed in the main shrouds, and English colours over French at the ensign staff. She was also under jury-masts, had some shot holes, and in every way intimated herself to be a distressed prize to some of the British ships. Captain Russell at once approached to succour her, but she immediately, by a preconcerted and rapid movement, aimed at carrying away the bowsprit of the 'Hussar,' raking, and then boarding her. This *ruse de guerre*, of so black a tint, was only prevented taking full effect by the promptitude of Captain Russell, who managed to turn his ship in such a way as only to receive half the raking fire. He then engaged with the 'Sybille,' and, on eventually capturing her, publicly broke the sword of the French captain, whom he considered had sullied his reputation by descending to fight the 'Hussar' for above thirty minutes under false colours, and with signals of distress flying. 'She' (the 'Hussar'), said Captain Russell, 'had not had fair play, but Almighty God had saved her from the most foul snare of the most perfidious enemy.' He confined the captain of the 'Sybille' as a State prisoner. It appears that the latter was subsequently brought to trial by his own Government, but was acquitted. Again, in 1813, two merchants of New York, encouraged by a promise of reward from the American Government, formed a plan for destroying the British 74-gun ship 'Ramillies,' Captain Sir Thomas Masterman Hardy. A schooner was laden with several casks of gunpowder, having trains leading from a species of gunlock, which, upon the principle of clock-work, went off at a given period after it had been set. On deck were some casks of flour, as it was known that the 'Ramillies' was short of provisions, and it was supposed that Captain Hardy would immediately seize her to revictual his ship. Thus murderously laden, she approached the 'Ramillies,' which detached a boat with thirteen men and a lieutenant to cut her off. The crew immediately abandoned the ship, which was taken by the lieutenant. A few hours afterwards she blew up, the lieutenant and ten of the sailors were killed, and the other three men were shockingly scorched.

Ortolan misrepresents the conduct of an English frigate

in the following terms:—‘On September 4, 1800, the English took forcible possession of a Swedish vessel, then neutral, near Barcelona, put a large number of English soldiers and marines on board, and entering the harbour in the night under this neutral flag, and in a neutral vessel, surprised and captured two Spanish frigates which were lying at anchor.’ He then proceeds to denounce it as an act of perfidy, whereas the true facts were as follows:—While Barcelona was under blockade of British ships of war, two Spanish corvettes, of twenty-two guns each, were lying in harbour. Sir Thomas Louis determined to cut them out, and ordered eight boats to assist the ‘Niger,’ under Captain (afterwards Sir James) Hillyar, in so doing. The attack was late in the evening, and one of the boats was at that time boarding a Swedish galliot, bound into the port. To join this boat, and give directions to the officers, Hillyar went alongside, and continued there with all his boats, while the vessel stood in toward the mole. As they approached to the distance of three-quarters of a mile, Hillyar and his party quitted the vessel: two shots were at this moment fired, which passed over the galliot, and two or three minutes after the enemy’s outer ship, in Barcelona, discharged her broadside at them; the shot fell short. This proved that the Spaniards did not respect the neutrality of the Swedish flag, and consequently that it did not avail in protecting the British boats, which immediately pulled in. The outer ship was immediately boarded. The other ship thereupon opened fire, but was also carried. The affair was achieved after dark, when no flag could be distinguished, but even if the case was as the Spaniards represent, it did not prevent their firing upon a defenceless neutral. The Swedish vessel neither contributed to the success of the enterprise, nor to the safety of the men, but it made an impression to the disadvantage of Hillyar, and it required much explanation before the Admiralty and Lord Nelson saw the matter in its true light.¹

§ 18. We will now inquire how far stratagems are allowable at sea, or how far a vessel may act under false colours. ‘To sail and chase under false colours,’ says Sir William Scott, ‘may be an allowable stratagem in war, but firing under false colours is what the maritime law of England does

**What are
forbidden**

¹ Ortolan, *Dép. de la Mer.*, tome ii. liv. iii. ch. i.; Brenton, *Nav. Hist.*, i.; *Précis des Evénements Militaires*, vol. vii. p. 117.

not permit ; for it may be attended with very unjust consequences ; it may occasion the loss of the lives of persons who, if they were apprised of the real character of the cruiser, might, instead of resisting, implore protection.' It will be noticed that the prohibition to fire under false colours is here put upon the ground of local law, no reference being made to any general rule of international jurisprudence. The subject of employing false colours was much discussed during the 'Alabama' controversy with the United States, that Government frequently pressing the point on the British Government, especially in reference to the 'Oreto' and the 'Alabama.'¹ 'It is a rule of the law of nations,' say Pistoye and Duverdy, 'that on the sea a vessel cannot attack another vessel before having made known its nationality, and having put the vessel which it encounters in a position of declaring its own nationality.' The ancient rule of maritime law, as stated by Valin, was that the *affirming gun* (*coup de semonce, ou d'assurance*) could be fired only under the national flag.² Such were the provisions of the ancient ordinances of France. But article 33 of the Arrêté du 2 Prairial merely prohibited the firing a shot (*tirer à boulet*) under a false flag, and the law of April 10, 1825, article 3, provided that captains and officers who *commit acts of hostility* under a flag other than that of the State by which they are commissioned, shall be treated as pirates. Ortolan says that the affirming gun may be fired under false colours, but all acts of hostility must be under the national flag. Massé and Hautefeuille seem to adopt the opinion that the affirming gun (*coup de semonce*) should be fired only under national colours. But as such gun is in no respect an act of hostility, we can perceive no good reason why it may not be fired under false colours.³

**Deceitful
intelli-
gence**

§ 19. *Deceitful intelligence* may be divided into two classes : false representations made in order that they may fall into the enemy's hands and deceive him, and the representations of one who feigns to betray his own party, with a view of drawing the enemy into a snare ; both are justifiable by the laws

¹ See United States case, and the counter case, 1872.

² *Semoncer* means to 'warn in a loud voice,' not to *summon*.

³ The 'Peacock,' 4 *Rob. Rep.*, p. 187 ; Pistoye et Duverdy, *Traité des Prises*, tit. v. ch. i. ; Massé, *Droit Commercial*, tome i. § 307 ; Hautefeuille, *Droit des Nations Neutres*, tome iv. p. 8 ; Valin, *Traité des Prises*, ch. ii. sec. i. § 9 ; 'La Esperanza,' 1 *Hagg.*, 90.

of war. The commanders sometimes make false representations of the number and position of their troops, and of their intended military operations, for the purpose of having them fall into the enemy's hands, and of deceiving him ; this is not only allowable, but is regarded as a commendable *ruse de la guerre*. If an officer deliberately makes overtures to an enemy, offering to betray his own party, and then deceives that enemy with false information, his procedure is deemed infamous ; nevertheless, the enemy has no right to complain of the treachery, for he should not have expected good faith in a traitor. But if the officer had been tampered with by offers of bribery, he may lawfully feign acquiescence to the proposal with a view to deceive the seducer ; he is insulted by the attempt to purchase his fidelity, and he is justified in revenging himself by drawing the tempter into a snare. ' By this conduct,' says Vattel, ' he neither violates the faith of promises nor impairs the happiness of mankind, for criminal engagements are absolutely void, and ought never to be fulfilled, and it would be a fortunate circumstance if the promises of traitors could never be relied on, but were on all sides surrounded with uncertainties and danger. Therefore, a superior, on information that the enemy is tempting the fidelity of an officer or soldier, makes no scruple of ordering that subaltern to feign himself gained over, and to arrange his pretended treachery so as to draw the enemy into an ambuscade.'¹

§ 20. *Spies* are persons who, in *disguise*, or under *false pretences*, insinuate themselves among the enemy, in order to discover the state of his affairs, to pry into his designs, and then communicate to their employer the information thus obtained. The employment of spies is considered a kind of clandestine practice, a deceit in war, allowable by its rules. ' Spies,' says Vattel, ' are generally condemned to capital punishment, and not unjustly, there being scarcely any other way of preventing the mischief which they may do. For this reason, a man of honour, who would not expose himself to die by the hands of the common executioner, ever declines serving as a spy. He considers it beneath him, as it seldom can be done without some kind of treachery. The sovereign, therefore, cannot lawfully require such a service of subjects, except, perhaps, in some singular case, and that of the last importance.

Use of
spies

¹ De Cussy, *Droit Maritime*, liv. i. tit. iii. § 24.

It remains for him to hold out the temptation of a reward, as an inducement for mercenary souls to engage in the business. If those whom he employs make a voluntary tender of their services, or if they be neither subject to, nor in any wise connected with, the enemy, he may unquestionably take advantage of their exertions, without violation of justice or honour.' No authority can require of a subordinate a treacherous or criminal act in any case, nor can the subordinate be justified in its performance by any orders of his superior. Hence the odium and punishment of the crime must fall upon the spy himself, although it may be doubted whether the employer is entirely free from the moral responsibility of holding out *inducements* to treachery and crime. That a general may profit by the information of a spy, the same as he may accept the offers of a traitor, there can be no question ; but to seduce the one to betray his country, or to induce the other, by promises of reward, to commit an act of treachery, is a very different matter. The term *spy* is frequently applied to persons sent to reconnoitre an enemy's position, his forces, defences, &c., but not in disguise, or under false pretences. Such, however, are not *spies* in the sense in which that term is used in military and international law, nor are persons so employed liable to any more rigorous treatment than ordinary prisoners of war. It is the *disguise*, or *false pretence*, which constitutes the perfidy, and forms the essential elements of the crime, which, by the laws of war, is punishable with an ignominious death.¹ During the Franco-German War of 1870, the Prussians considered persons who attempted to pass their outposts in balloons to be spies, because such persons possibly did so with a view of making use of the information thus gained, to the disadvantage of the Prussians. But such opinion is contrary to the proposed Articles of the Conference of Brussels, 1874, for persons in balloons are not acting secretly ; nor can it be supported by any well-established principles of the laws of war.

¹ Vattel, *Droit des Gens*, liv. iii. ch. x. §§ 179, 182 ; Grotius, *De Jure Bell. ac Pac.*, lib. iii. cap. iv. § 18 ; Bello, *Derecho Internacional*, pt. ii. cap. vi. § 2 ; Heffter, *Droit International*, § 250 ; Riquelme, *Derecho Púb. Int.*, lib. i. tit. i. cap. xii.

During the Franco-German war (1870) the correspondents of the *Figaro* and *Gaulois* (French newspapers) were taken at Soultz-les-Forêts by the Prussians. It was suggested that they should be hanged as spies, but they were remitted by the Crown Prince, to be 'set free as soon as they can do no harm.'

By 29 and 30 Vict. c. 109 (Naval Discipline Act), s. 6, spies can be tried by a naval court-martial, and shall suffer death or other punishment.

§ 21. Notwithstanding the criminal character of a spy, it has not unfrequently happened that men of high and honourable feelings have been induced to undertake the office ; and although this fact has somewhat lessened, in popular opinion, the odium of the act, it has failed to diminish the severity of its punishment. Two of the most notable instances of this kind to be found in military history, occurred during the war of the American Revolution. After the retreat of Washington from Long Island, in 1776, Captain Nathan Hale recrossed to that island, entered the British lines *in disguise*, and obtained the best possible intelligence of the enemy's forces, and their intended operations ; but, in his attempt to return, he was apprehended, and brought before Sir William Howe, who gave immediate orders for his execution by the provost marshal *as a spy* ; and these orders were carried into execution the very next morning, the prisoner not being allowed to see a clergyman, nor even the use of a Bible, although he respectfully asked for both. In 1780, the American General Arnold, commanding the fortress at West Point, carried on negotiations with Sir Henry Clinton to enable the latter to surprise that fortress. Major André was the English agent, and had frequent communication with Arnold, on the beach, without the posts of both armies. One night, being unable to return by a boat, as was his custom, *he changed his uniform*, which he wore under a surtout, for a common coat, and tried to return on horseback to his own lines, but was taken prisoner. Two foreigners ignorant of English, and several of the most illiterate American generals, were members of the court-martial. The fact of being accidentally (not for any purpose of *espionage*) dressed as a citizen, instead of being in uniform,

Cases of
Hale and
André

Hale says (*Pleas of the Crown*) that 'if an alien enemy come into this kingdom hostilely to invade it, if he be taken he shall be dealt with as an enemy, but not as a traitor, because he violated no trust or allegiance.' So adjudged in Lord Herise's case. In 1695 a court-martial was authorised to try Tobias le Roy, alias Boerke, 'lately come out of France with a commission from the French king, whose subject he owns himself to be, so that he might be justly deemed to be a spy, and to have treacherous designs against our person and Government,' and if guilty to punish him by death, or otherwise, according to the military law of nations.

was argued as an aggravation to his crime. Three months elapsed before his execution. When he saw the gallows, instead of the rifle, his firmness in some degree forsook him. He only said, 'I die for the honour of my king and country,' to which General Green, the American commander who presided, observed, 'No, you die for your cowardice and like a coward.' Washington signed his death-warrant with great reluctance. Arnold escaped on board a British man-of-war. The American Government would doubtless have saved André if the British Government would have given up the traitor Arnold. As for André, in the opinion of King George III., his character was untarnished; a pension was settled on his mother, and his brother was created a baronet.

It has been argued by American writers that even if André were not a spy, in the strict technical meaning of that term, he nevertheless deserved death, for the laws of war impose that punishment upon anyone who attempts to seduce the fidelity of an officer by bribery, or to induce a soldier to desert his colours. And this penalty is now prescribed by the statutes of the United States.¹

Reward-
ing
traitors

§ 22. While all agree that we have no right to require any man to perform the services of a spy, and that if we attempt to tamper with the fidelity of an enemy's officer or soldier, we incur the risk of such punishment as that enemy, under the laws of war, may impose, there is a difference of opinion with regard to our rewarding such acts. Some say that we may purchase treason or desertion, if we merely accept offers which are made to us; while others contend that, if we pay money for the services of a spy, or for the surrender of a fort, or an army, or for traitorous acts which may lead to their capture, we encourage perfidy and treachery nearly as much as though the offer first came from ourselves. Without attempting to decide this question of ethics, we will merely remark, that the Romans, in their heroic ages, rejected with indignation every advantage offered by an enemy's subjects. They sent back to the Falisci, bound and fettered, the traitor who had offered to deliver up the king's children; and they refused to make any account of the victory of their consul over Viriatus, because

¹ Mahon, *Hist. of England*; Hamilton, *Hist. of the Republic*, vol. i.; Sargeant, *Life of Major André*; Holmes, *Annals*, 305; Faux's *Mem. Days*, 402.

it had been obtained by means of bribery. In speaking of the lawfulness of such acts, Vattel remarks that, although generals practise them, they are never heard to boast of having done so.

§ 23. It sometimes happens in war that intestine divisions ^{Intestine divisions} prevail among the enemy's forces, and that one party may favour the objects for which we are contending ; in such cases we may, without scruple, hold correspondence with the one faction, and avail ourselves of its assistance to overthrow the other party. We thus promote our own interest and gain the objects of the war, without seducing anyone to crime, or even becoming the partakers of treachery. The right to side with a faction in war is broadly different from the pretended right of forcible intervention in time of peace. A third party may side with the one or the other of the conflicting forces, just as he might in a war between separate and independent nations. If he have just cause of war against one of the parties, he may avail himself of the assistance of the other.¹

¹ Vattel, *Droit des Gens*, liv. iii. ch. x. § 181 ; Kent, *Com. on Am. Law*, vol. i. p. 25 ; Bello, *Derecho Internacional*, pt. ii. cap. vi. § 3.

END OF THE FIRST VOLUME

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